DOCKET

No. 07-610

Title: Daniel B. Locke, et al., Petitioners

v.

Edward A. Karass, State Controller, et al.

Docketed: November 8, 2007

Lower Ct: United States Court of Appeals for the First Circuit

Case Nos.: (06-1747)

Decision Date: August 8, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 6 2007	Petition for a writ of certiorari filed. (Response due December 10, 2007)
Nov 28 2007	Order extending time to file response to petition to and including January 9, 2008, for all respondents.
Dec 5 2007	Waiver of right of respondents Edward A. Karass, State Controller, et al. to respond filed.
Jan 9 2008	Brief of respondent Maine State Employees Association, SEIU Local 1989 in opposition filed.
Jan 23 2008	DISTRIBUTED for Conference of February 15, 2008.
Jan 29 2008	Reply of petitioners Daniel B. Locke, et al. filed. (Distributed)
Feb 19 2008	Petition GRANTED.
Mar 17 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 5, 2008.
Apr 7 2008	Joint appendix filed. (Statement of costs received)
May 5 2008	Brief of petitioners Daniel B. Locke, et al. filed.
May 12 2008	Brief amicus curiae of United States filed.
May 12 2008	Motion for leave to file amici brief filed by Pacific Legal Foundation, et al.
May 12 2008	Brief amicus curiae of Commonwealth of Virginia in support of neither party filed.
May 14 2008	The time within which to file respondents' briefs on the merits is extended to and including July 7, 2008.
May 30 2008	The time within which to file respondents' briefs on the merits is further extended to and including July 17, 2008.
Jun 2 2008	Motion for leave to file amici brief filed by Pacific Legal Foundation, et al. GRANTED.
Jun 4 2008	Application (07A961) for an extension of time within which to file petitioners' reply brief on the merits to and including September 8, 2008, submitted to Justice Souter.
Jun 6 2008	Application (07A961) granted by Justice Souter for an extension of time within which to file petitioners' reply brief on the merits to and including September 8, 2008.

Jun 9 2008	SET FOR ARGUMENT ON Monday, October 6, 2008.
Jul 3 2008	CIRCULATED
Jul 17 2008	Brief of respondents Maine State Employees Association, SEIU Local 1989 filed. (Distributed)
Jul 24 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 28 2008	Petitioners' opposition to motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 5 2008	Record received from the U.S.C.A. for the First Circuit. (1 box)
Aug 8 2008	Record received from the U.S.D.C. for the District of Maine. (1 box)
Aug 29 2008	Application (08A190) to extend the time to file a reply brief on the merits from September 8, 2008 to September 11, 2008, submitted to Justice Souter.
Sep 2 2008	Application (08A190) granted by Justice Souter extending the time to file until September 11, 2008.
Sep 5 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Sep 11 2008	Reply of petitioners Daniel B. Locke, et al. filed. (Distributed)
Oct 6 2008	Argued. For petitioners: W. James Young, Springfield, Va. For respondents: Jeremiah A. Collins, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

No. 07-_____

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DANIEL B. LOCKE; *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER; REBECCA M. WYKE, COMMISSIONER, DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES; KENNETH A. WALO, DIRECTOR, MAINE BUREAU OF EMPLOYMENT RELATIONS; AND MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

In *Ellis v. Railway Clerks*, this Court unanimously "determined that the [Railway Labor Act], as informed by the First Amendment, prohibits the use of dissenters' [union] fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1981) (opinion of Blackmun, J., *citing Ellis*, 466 U.S. 435, 453 (1984)). In *Lehnert*, a four-member plurality therefore held "that the Amendment proscribes such assessments in the public sector." *Id.* Moreover, Justice Scalia's separate opinion, concurring in part in the judgment announced by Justice Blackmun, reasoned that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Id.* at 555.

May a State, nonetheless, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside of a nonunion employee's bargaining unit?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

> Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, Beth Weirich, Edward A. Karass, Controller for the State of Maine, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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Petitioners Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, and Beth Weirich, for themselves and the class they seek to represent ("the Nonmembers"), respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on 8 August 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, Appendix ("App.") A, *infra* 1a, is reported at 498 F.3d 49 (1ST CIR. 2007). The decision of the United States District Court for the District of Maine, App. B, *infra* 42a, granting Defendants' Motions for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, is reported at 425 F. Supp. 2d 137 (D.ME. 2006).

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on 8 August 2007. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993). The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. *See* App. C, *infra* 67a and App. D, *infra* 68a.

STATEMENT OF THE CASE

In *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), Justice Scalia — joined by Justices O'Connor, Souter, and Kennedy — vigorously warned that the plurality's test "both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." *Id.* at 550 (dissenting in part). He noted that the test "provides little if any guidance to parties contemplating litigation or to lower courts. It does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned." *Id.* at 551.

This case vindicates Justice Scalia's prediction. It presents the question whether, under this Court's judgment in *Lehnert*, the First and Fourteenth Amendments are violated when a state and a union force nonunion public employees to subsidize litigation activities undertaken by affiliated labor organizations for bargaining units other than the nonunion employee's bargaining unit.

I. The Facts

The Nonmembers are twenty current or former public employees in four bargaining units within the

State of Maine's executive branch who are not members of the labor organization designated as their monopoly bargaining representative, the Maine State Employees Association ("MSEA"), Local 1989, Service Employees International Union ("SEIU"). The Nonmembers are required by the monopoly bargaining agreements governing their terms and conditions of employment to pay to MSEA "a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract administration as defined by law."[1]

MSEA prepared and distributed two "*Hudson*" notices[2] to nonmembers to address the fact that members' dues exceed the amount expended for providing its monopoly bargaining "services." App. A at 2a-6a; 498 F.3d at 51-53. These excess fees represent what are referred to in the case law and in MSEA's "*Hudson*" notice as "nonchargeable expenses." App. A at 4a n.5; 498 F.3d at 51 n.5. These notices revealed that portions of the fees treated as chargeable by MSEA are paid over to the SEIU to subsidize the latter's litigation concerning bargaining units other than the Nonmembers', including units outside Maine. *Id.* at 5a; 498 F.3d at 52.

Only if a nonmember timely responds to MSEA's notice — or "objects" to the fees charged — does MSEA

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[1] Certain nonmembers, including Petitioners, were subject to a "grand-father" clause limiting the fee to one-half paid by employees hired after 2 July 2003. App. A at 4a n.6; 498 F.3d at 52 n.6. That exception expired after one year, and thereafter all nonmember employees have been subject to the requirement that they pay the full agency fee.

[2] This process stems from the guidelines stated in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986).

refrain from collecting that portion of union dues identified in its notice as "nonchargeable." App. B at 53a-55a; 425 F.Supp. 2d at 145. Nonmembers failing to file a timely objection receive no advance reduction of the fee and must subsidize the MSEA's and its affiliates' nonchargeable activities. *Id.* At issue here is that portion of the fee expended for MSEA's affiliates' extra-unit litigation activities, which MSEA claims to be fully chargeable to objecting nonmembers.

II. The Proceedings Below

On 16 June 2005, the Nonmembers filed this class action law suit alleging, *inter alia*, that MSEA and the State Defendants[3] were collecting and/or were attempting to collect agency fees that included portions that:

> will be used by Defendant MSEA and/or its affiliates for purposes that are not "germane" to collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding "free riders," and/or significantly add to the burdening of free speech that is inherent in the allowance of an "agency shop," including, but not limited to:
>
> ****

[3] The State Defendants are Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of its Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, who enforced, for MSEA's benefit, the forced-unionism provisions authorizing the exaction of agency fees.

> c. litigation that does not concern the dissenting nonmember's bargaining unit and union literature reporting on such activities;

Record ("R.") 1: Complaint, ¶ 33.

The Complaint sought declaratory and injunctive relief, equitable restitution, and attorneys' fees and costs for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. R. 1, ¶¶ 1, 3. Jurisdiction of the District Court, therefore, was invoked under 28 U.S.C. §§ 1331 and 1343. *Id.*, ¶¶ 2-3.

After discovery, and upon cross-motions for summary judgment, the trial court held "as a matter of law that the inclusion of the cost of extra-litigation does not violate Plaintiffs' constitutional rights." App. B at 58a; 425 F. Supp. 2d at 147.

The trial court reasoned that Justice Blackmun's plurality opinion in *Lehnert* holding extra-unit litigation nonchargeable "was joined only by Chief Justice Rehnquist and Justices White and Stevens," and therefore "does not state a majority opinion that is binding on this Court." App. B at 57a; 425 F. Supp. 2d at 146. The trial court instead found more persuasive decisions of the Third and Sixth Circuits that also declined to follow Justice Blackmun's opinion and the Court's ruling in *Ellis* that Justice Blackmun had applied to public employees. App. B at 58a, 425 F. Supp. 2d at 147, *citing Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), *and Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 138 (3D CIR. 2003).

The district court therefore entered judgment for Defendants. R. 91: Judgment.

Petitioners timely appealed, and a three-judge panel of the United States Court of Appeals for the First Circuit affirmed. App. A at 34a; 498 F.3d at 66.[4]

Unlike the District Court,[5] the panel acknowledged that this Court held in *Ellis* that:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.***

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[4] Petitioners also appealed from their timely Motion for Class Certification, R. 55, which had been denied as moot. App. B at 44a; 425 F. Supp. 2d at 151. Because the First Circuit affirmed the district court in all of its particulars, it did not reach this issue. App. A at 7a n.8; 498 F.3d at 53 n.8.

[5] The trial court's opinion refers to *Ellis* only once, and only for the proposition that "advance reduction of dues and/or interest-bearing escrow accounts" would protect nonmembers from any First Amendment violations." App. B at 59a n.5; 425 F. Supp. 2d at 147 n.5.

Ellis, 435 U.S. at 453 (emphasis added), *quoted at* App. A at 13a; 498 F.3d at 54 (without emphasis). The panel likewise recognized that the expenditures at issue in this case are "litigation expenses incurred by its national affiliate" for "litigation on behalf of, or by, a union entity other than the local which represents the nonmember employees." App. A at 2a & n.1; 498 F.3d at 50 & n.1. Nevertheless, purporting to rely upon *Lehnert*, the panel held that:

> *Lehnert* addressed a different factual context — a pooling arrangement — and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*.... *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

App. A at 29a; 498 F.3d at 63-64, **citing** 500 U.S. at 523-24.

REASONS FOR GRANTING THE WRIT

This Court has regularly granted review to consider questions of the chargeability to objecting nonmembers of union expenses, either under the First Amendment, or to avoid serious doubts as to the constitutionality of a monopoly bargaining scheme. *See Railway Employes' Dep't. v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). However, the lower courts are in disarray over this Court's most recent pronouncement on the topic: its 1991 *Lehnert* decision.[6]

"Because of the importance of the issues," this Court granted *certiorari* in *Lehnert* to decide whether objecting nonmembers could constitutionally be compelled to subsidize six types of union activities, including extra-unit litigation. 500 U.S. at 514. The Court there held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

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[6] Circuit Judge Lynch concurred with her colleagues, but wrote separately to express her belief that the issue herein was "left unanswered" in *Lehnert*, and that it is one on which circuit courts differ. App. A at 35a; 498 F.3d at 66. Recognizing this dispute, she noted that "[d]ecision of this issue by the Supreme Court would provide needed clarity." App. A at 41a; 498 F.3d at 69.

However, rejecting a narrowly-focused bargaining-unit standard of chargeability of "non-political expenses," 500 U.S. at 519, this Court concluded:

> that a local bargaining representative may charge objecting employees for their *pro rata* share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.

Id. at 524. Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, explicitly recognized one exception to this conclusion:

> This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities.

Id. at 528 (plurality opinion).

Moreover, Justice Scalia's partial concurrence explicitly relied upon *Ellis*' holding that extra-unit litigation is not chargeable and found that "there is good reason to treat" *Ellis* "as reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (*quoting Ellis*, 466 U.S. at 453).

Nonetheless, since *Lehnert*, there has been confusion among the lower courts as to: (1) whether a majority of this Court held that the First Amendment prohibits the extraction from dissenting nonmembers of fees for extra-unit litigation, and thus, binds the

courts of appeals; and (2) if not, whether extra-unit litigation satisfies *Lehnert*'s three-prong chargeability test. Indeed, the panel's decision below acknowledged "the uncertainty about the constitutionality of charging nonmembers of a union for the costs of extra-unit litigation." App. A at 33a, 498 F.3d at 66.

This confusion on the first point enabled the First Circuit to depart from the Court's holdings "regarding what the First Amendment will countenance in the realm of [state-compelled] union support." *Lehnert*, 500 U.S. at 516.[7]

Thus, notwithstanding the categorical rule stated unanimously by this Court in *Ellis*, 435 U.S. at 453, the panel below contrived to further expand the extraordinary privilege granted Maine's public employees labor unions to seize and use nonmembers' wages. Consequently, the Nonmembers must not only subsidize MSEA's activities for their bargaining units; in addition, the panel granted MSEA license to compel the Nonmembers to subsidize an international affili-

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[7] This Court has repeatedly recognized the significant constitutional interests implicated in compelling employees to support their monopoly bargaining representative. As recently as last Term, this Court unanimously noted the "extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport v. Washington Educ. Ass'n.*, — U.S. —, 127 S. Ct. 2372, 2380 (2007) (original emphasis); *see also Lehnert*, 500 U.S. at 516 ("To force employees to contribute, albeit indirectly, to the promotion of [a wide range of social, political, and ideological viewpoints] implicates core First Amendment concerns"); *Abood*, 431 U.S. at 222 ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests").

ate's litigation activities far afield from and not related to their bargaining unit or, indeed, even the State of Maine.

The panel below erroneously constructed out of this Court's splintered decision in *Lehnert* a result: (1) expressly disavowed by the *Lehnert* plurality; (2) implicitly rejected by Justice Scalia's concurrence; and (3) in direct conflict with this Court's categorical and undisturbed rule in *Ellis*.

I. The Panel's Decision Conflicts with Numerous Decisions of This Court.

The decision below directly conflicts with this Court's holdings that unions may not compel employees in one bargaining unit to subsidize litigation activities for other bargaining units.

In *Ellis*, 466 U.S. at 453, this Court unanimously held that the Railway Labor Act ("RLA")[8] prohibits a union from extracting such "extra-unit litigation expenditures" from objecting nonunion employees. This Court was quite specific in its holding:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within

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[8] 45 U.S.C. § 152, Eleventh.

> the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*** Contrary to the view of the Court of Appeals, therefore, ***unless the[ir] ... bargaining unit is directly concerned***, objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

Ellis, 466 U.S. at 453 (emphasis added).

Seven years later, in *Lehnert*, a clear majority of the Court recognized that *Ellis*' holding was driven by constitutional concerns. Justice Blackmun, joined by three other Justices, explained that *Ellis* determined that "the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation." *Lehnert*, 500 U.S. at 528 (plurality opinion). Moreover, Justice Scalia, also joined by three others, concluded that, although *Ellis* was a statutory case, "there is good reason to treat [it] as merely reflecting the constitutional rule." *Id.* at 555 (Scalia, J., concurring in part).

A majority in *Lehnert* adopted a "proverbial three-part test," *id.* at 550 (Scalia, J., concurring in the judgment, dissenting in part), for determining the constitutional limits on the authority of a union to extract from nonmember objectors fees for its activities:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. at 519.

In applying this test to affiliate activities, this Court held that "unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union," *Id.* at 527. However, Justice Blackmun (joined by Chief Justice Rehnquist and Justices White and Stevens) limited that broad holding:

> This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities. While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extra-unit litigation to be more akin to lobbying in both kind and effect. We long have recognized

> the important political and expressive nature of litigation. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 431 (1963) (recognizing that for certain groups, "association for litigation may be the most effective form of political association"). Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. *See Ellis*, 466 U.S., at 453. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector.

Lehnert, 500 U.S. at 528. Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, concurred in part with the result. He explicitly dissented only from the majority's holdings concerning the portions of the union's magazine reporting on general educational and similar miscellaneous matters that "have nothing whatever to do with bargaining," *id.* at 559-60, conventions "of *another* organization with which the union-bargaining agent chooses to affiliate," *id.* at 560, and strike-preparation activities, *id.* at 562.

Justice Scalia did not dissent from Justice Blackmun's ruling on extra-unit litigation. To the contrary, Justice Scalia viewed as "reflecting the constitutional rule" this Court's holding in *Ellis* that lawfully chargeable litigation expenses are "only those for litigation

'incident to negotiating and administering ***the contract*** or to settling grievances and disputes ***arising in the bargaining unit***, and 'other litigation . . . ***that concerns bargaining unit employees*** and is normally conducted by the exclusive representative.'" 500 U.S. at 555 (emphasis added) (*quoting* 466 U.S. at 453).[9]

Nevertheless, the panel below held that dues supporting such activities could be extracted from nonunion State of Maine employees. App. A at 33a; 498 F.3d at 66.

The panel mistakenly believed that *Lehnert* permits a union to do through creative accounting and shell games what it may not do directly: charge nonmembers for extra-unit litigation. The panel, opining that *Lehnert* represented the "first time" that this Court had addressed "the chargeability of 'pooled expenses,'" App. A at 16a; 498 F.3d at 57, concluded that the *Lehnert* Court "adopted a different standard of germaneness than that used by the *Ellis* Court." *Id.* at 18a; *id.* at 58. According to the First Circuit, "*Lehnert* defined germaneness more broadly to take account of the nature of affiliation relationships and the pooling of resources characteristic of such relationships." *Id.* at 18a; *id.* at 58-59.

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[9] Although he agreed with Justice Blackmun's three-part test, Justice Marshall specifically noted his "disagree[ment] with ***the Court's decision*** that the costs of articles printed in MEA's employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (Marshall, J., dissenting in part) (emphasis added).

The panel concluded that "[a]lthough a majority of the Justices agreed on this general standard for evaluating the chargeability of pooled expenses, they did not reach agreement on the permissibility of charging nonmembers for extra-unit litigation funded through a pooling arrangement." *Id.* at 18a-19a; *id.* at 58-59. For this proposition, the panel cited Justice Marshall's lone dissent on this issue, *Lehnert*, 500 U.S. at 544-47 (disagreeing with the plurality on extraunit litigation), and Justice Scalia's concurrence, *id.* at 550-62 , mistakenly stating that "Justice Scalia did not mention extra-unit litigation specifically." *Id.* at 21a; *id.* at 59-60. As already noted, in fact Justice Scalia **quoted** *Ellis*' holding on extra-unit litigation and considered it as "reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555.

Moreover, joining only the Third Circuit, *see infra* at 20-21, the panel below constructed ambiguity out of *Ellis*' categorical holding:

> While the language in *Ellis* suggests, at first blush, that only litigation by or for the particular bargaining unit involved can be charged to nonmembers, a closer reading of the opinion reveals a more limited holding. As *Otto* noted, the *Ellis* court was not confronted with a pooling arrangement, 330 F.3d at 136; its decision pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate) — meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time.

App. A at 27a-28a; 498 F.3d at 63 (*citing Otto v. Pennsylvania Educ. Ass'n*, 330 F.3d 125, 136 (3D CIR. 2003)).

Both courts erroneously assumed that *Ellis* did not involve a pooling arrangement. The litigation expenditures at issue in *Ellis* were not from "local union monies" contributed to other units or the national affiliate. They were litigation expenditures of the national affiliate (Grand Lodge) to which the plaintiff nonmembers paid part of their dues directly. *See Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2341 (1976), *further proceedings*, 108 L.R.R.M. (BNA) 2648, 2650 (S.D. CAL. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065, 1068, 1073 (9TH CIR. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). Indeed, *Lehnert* noted that the Court recognized the pooling arrangement in *Ellis*. *See* 500 U.S. at 523.

If a nonmember may only be charged for "expenses of litigation incident to negotiating and administering ***the*** contract or to settling grievances and disputes arising in ***the*** bargaining unit," *Ellis*, 466 U.S. at 453 (emphasis added), then he/she surely cannot be indirectly charged for "[t]he expenses of litigation not having such a connection with the bargaining unit," *id.*, regardless of how those monies are transmitted from his or her forced fees. The panel's elevation of union form over constitutional substance is contrary to this Court's decisions in both *Ellis* and *Lehnert*.

II. There Is A Serious Split Among the Circuits.

There is a serious split among the Circuits on the chargeability of extra-unit litigation. The Tenth Circuit, and a substantial minority of judges of the *en banc* Fourth Circuit, have found that compelling nonmembers to subsidize extra-unit litigation violates the First and Fourteenth Amendments. The First Circuit panel, on the other hand, joined the Third and Sixth Circuits in holding that such forced-exactions are constitutional.

In the immediate aftermath of *Lehnert*, the Tenth Circuit agreed that extra-unit litigation is constitutionally nonchargeable. *Pilots Against Illegal Dues v. Air Line Pilots Ass'n ("PAID")*, 938 F.2d 1123, 1129-31 (10TH CIR. 1991).

The Tenth Circuit did so by applying the plain language of *Ellis*. 938 F.2d at 1129-30. Moreover, the Tenth Circuit discerned in *Lehnert* no retreat from the position this Court took in *Ellis* with regard to extra-unit litigation. To the contrary, the Tenth Circuit held that its "reading of *Ellis* is ***bolstered*** by the recent *Lehnert* decision" insofar as that decision "suggested" "further constitutional problems" in charging for extra-unit litigation. *Id.* at 1130 (emphasis added). Although conceding that "this section of Justice Blackmun's opinion was not adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation," the Tenth Circuit concluded that construction of the RLA to "relieve doubts concern-

ing the statute's constitutionality" mandated treating extra-unit litigation as nonchargeable. *Id.*

Extra-unit litigation expenditures were also challenged in *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295 (4TH CIR. 1993). There, five judges of the *en banc* Fourth Circuit[10] vigorously dissented from the majority's holding that the issue was not properly preserved for review.[11] However, every judge reaching the issue had no doubt that this Court's decisions hold extra-unit litigation expenditures to be nonchargeable. "In *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation') were not chargeable against the dissenter." 992 F.2d at 1304 (Russell, J., dissenting) (citations omitted); *see also id.* at 1312, 1316.

The five Fourth Circuit judges also rejected the argument that Justice Scalia was silent about extra-unit litigation, and thus there was no binding decision of this Court. Instead, the judges noted that Justice Scalia began his opinion by stating that he "would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent. *Lehnert*, 500 U.S. at 550 (Scalia, J., dissenting)." Then the judges held that "supporting litigation in other units is not a 'duty' that the [statute]

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[10] Judges Russell, Widener, Niemeyer, Hamilton, and Luttig. *Crawford*, 992 F.2d at 1303, 1318.

[11] Having found the issue not properly preserved, the panel majority "express[ed] no view about it." *Crawford*, 992 F.2d at 1301.

required the union here to perform." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).[12]

However, the First Circuit followed two circuits in holding extra-unit litigation to be chargeable. The Sixth Circuit in *Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), likewise applied *Lehnert*'s general test to evade *Ellis*' categorical and specific holding and treated an affiliate's extra-unit litigation expenditures as chargeable to nonmembers. Indeed, *Ellis* is cited nowhere in the Sixth Circuit's decision.

More recently, in *Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 135-39 (3D CIR. 2003), the Third Circuit refused to follow *Ellis* based upon its speculative — and erroneous — doubts that: (1) the litigation expenses in *Ellis* were "incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement"; and (2) the *Ellis* Court "intended" to state a *per se* rule against the chargeability of extra-unit litigation expenses." 330 F.3d at 136.

Additionally, although agreeing that Justice Blackmun's plurality of four held that "dissenting employees may not be charged for the costs of union literature

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[12] Judge Silberman also has discussed this Court's holding on extra-unit litigation, stating that the "Supreme Court has held that non-members cannot be charged for general union organizing costs, for lobbying activities, ***or for litigation expenses not directly associated with their collective bargaining unit*** (the latter since the Supreme Court understands such litigation to be 'political')." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1280-81 (D.C.CIR. 1995) (emphasis added) (Silberman, J., concurring *dubitante*) (*citing Ellis*, 466 U.S. at 448; *Lehnert*, 500 U.S. at 519-22, 528 and *id.* at 555 (Scalia, J., concurring in the judgment)).

reporting on extra-unit litigation because they cannot be charged for such litigation itself under *Ellis*," 330 F.3d at 137, the Third Circuit reasoned that Justice Scalia did not "apply his preferred test to the question whether dissenting employees could be charged ... (for the expenses of extra-unit litigation itself)." *Id.* Declaring itself therefore free from any "definitive Supreme Court guidance," *id.* at 137-38, the Third Circuit applied *Lehnert*'s three-part chargeability test and reached a conclusion contrary to that of the test's author: "Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling arrangement differently from any other pooled expenses." *Id.* at 139.

In following the Third and Sixth Circuits, and declining to follow the contrary decision of the Tenth Circuit, the First Circuit here had to repudiate one of its own prior decisions. In *Romero v. Colegio de Abogados de Puerto Rico*, the First Circuit noted that *Ellis* held "that it was error to permit the union 'to spend compelled dues for its general litigation and organizing efforts.'" 204 F.2d 291, 298 (1ST CIR. 2000) (*quoting Ellis*, 466 U.S. at 440).

Romero recognized that the *Ellis* "Court was clear that its interpretation was required to avoid constitutional difficulty," and that "[l]ater [Supreme Court] cases have interpreted *Ellis* as setting forth constitutional rules." *Romero*, 204 F.3d at 298 (*citing Lehnert*, 500 U.S. at 516). *Romero* explicitly explained that the "Court also said that the union could not compel payment for litigation expenses not arising out of the contract or not normally conducted by an exclusive

bargaining agent, despite the fact that there could be some indirect benefit to union members." *Id.* at 299 (*citing Ellis*, 466 U.S. at 453). The panel below dismissed *Romero*'s contrary interpretation of *Ellis* as "*dicta*." App. A at 27a n.15; 498 F.3d at 63 n.15.

III. The Panel's Decision Conflicts with State Supreme Court Decisions.

The First Circuit's decision in this case conflicts directly with the decisions of the highest courts of two States.

There is a direct conflict between the decision of the First Circuit in this case and the Indiana Court of Appeals and Supreme Court in *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666, 673 (IND. CT. APP.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N.E.2d 781 (IND. 1992); *accord Byrd v. AFSCME Council 62*, 781 N.E.2d 713, 722 (IND. CT. APP. 2003) (following *Albro*). In *Albro*, the Indiana Court of Appeals applied *Lehnert* to "hold that extra-unit litigation expenses are not chargeable fair share fee expenses." 585 N.E.2d at 673. The court first rejected the union's argument that extra-unit litigation is chargeable under Justice Scalia's test for chargeability: "Justice Scalia's concurring and dissenting opinion neither constitutes the opinion of the Court on this issue ***nor*** allows nonunion members to be charged for extra-unit litigation." *Id.* (emphasis added). The court then found that "the analysis in Justice Blackmun's opinion is persuasive" and adopted it. *Id.* Deter-

mining that the Court of Appeals was "correct in *Albro*," the Indiana Supreme Court affirmed and adopted "by reference that opinion in its entirety." *Aldrich*, 585 N.E.2d at 673.

Likewise, the First Circuit's decision conflicts directly with that of the Wisconsin Supreme Court in *Browne v. Wisconsin Employment Relations Commission*, 485 N.W.2d 376 (WISC. 1992). Addressing the issue of extra-unit litigation, the Wisconsin Supreme Court reasoned that, "there is no majority holding on this issue in *Lehnert*." However, it "found Justice Blackmun's plurality opinion persuasive." *Id.* at 388. Moreover, it "inferred from Justice Scalia's discussion of *Ellis* and from other early fair-share cases that a majority of the Court would find extra-unit litigation expenses nonchargeable." *Id.* The Wisconsin high court also concluded "that unless the litigation is directly related to the objecting employee's bargaining unit, it is nonchargeable," because "[e]xtra-unit litigation fails the first aspect of the *Lehnert* test — it is not germane to the collective bargaining activity of the local union." *Id.*

CONCLUSION

There is widespread confusion among the lower Federal and State courts over this Court's position on extra-unit litigation expenses. Consequently, the Circuit or State and/or type (*e.g.*, RLA or public-sector) of employment now determines whether extra-unit litigation expenses are chargeable to nonmembers, not the uniform decision of this Court. Where the question has not yet been determined, uncertainty and confusion are likely to continue as those Circuits and State courts must parse Justice Scalia's position on extra-unit litigation, and whether the *Lehnert* Court really meant what the Court said in *Ellis*, or whether *Lehnert* either reversed *sub silentio* or wrote exceptions into *Ellis* just seven years after the latter's unanimous and seemingly categorical holding.

That there is such confusion is mystifying because all of the Justices writing in *Lehnert* — except Justice Marshall, who specifically dissented from the Court's holding on this issue — pledged fidelity to *Ellis*, in which this Court issued a unanimous and categorical holding on the Question Presented. Nevertheless, the confusion exists, as the First Circuit conceded in this case. *See* App. A at 33a, 498 F.3d at 66; *id.* at 40a, 498 F.3d at 69 (Lynch, J., concurring). An individual's First Amendment rights should never depend upon geography or uncertainty a decade-and-a-half after a supposedly definitive ruling of this Court. Therefore, this Court should exercise its supervisory power to resolve that confusion and "provide needed clarity," as Circuit Judge Lynch recommended below, App. A. at 40a, 498 F.3d at 66.

For the reasons stated above, this petition for writ of *certiorari* should be granted, and as requested by Judge Lynch below, the case set for plenary briefing and argument on the important question presented.

Respectfully submitted,

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6 November 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

[Filed August 8, 2007]

No. 06-1747

DANIEL B. LOCKE, et al,
Plaintiffs, Appellants,

v.

EDWARD A. KARASS, State Controller;
Maine State Employees Association,
SEIU Local 1989, et al.,
Defendants, Appellees.

Heard Nov. 9, 2006
Decided Aug. 8, 2007

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[50] W. James Young, with whom Stephen C. Whiting and the Whiting Law Firm were on brief, for appellants.

Robert W. Alexander, with whom Heremiah Collins and Bredhoff & Kaiser,PLLC were on brief, for appellees.

OPINION

Before LYNCH, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LIPEZ, Circuit Judge.

LIPEZ, Circuit Judge.

This case raises a significant question under the First Amendment: may a union, functioning as the exclusive bargaining agent for certain state employees, charge nonmembers for litigation expenses incurred by its national affiliate, if that litigation is substantively related to the bargaining process and is funded through a pooling arrangement? Two other circuits have responded in the affirmative, one has answered in the negative. Our reading of the Supreme Court's most recent decision on this subject leads us to reply in the affirmative and hold that "extra-unit litigation"[1] may be charged to nonmembers **[51]** where it satisfies the "germaneness test" that generally applies to other pooled resources.[2] *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991). We therefore affirm the district court's entry of summary judgment for the union and against the nonmember employees.

I.

A. Factual Background

Both parties moved for summary judgment below; none of the material facts are in dispute.

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[1] The term "extra-unit litigation" refers to litigation on behalf of, or by, a union entity other than the local which represents the nonmember employees. It may encompass litigation undertaken by other local units or by a state or national affiliate.

[2] Although the *Lehnert* Court did not define "pooled resources" nor the related terms "pooling arrangement" or "affiliation relationship," we use all of those terms to refer to an agreement between a local union and a state or national union, by which the local contributes money to the state or national union, with the understanding that the latter will provide services, personnel, and resources to the local unit when that local needs them.

The Maine State Employees Association ("MSEA") is a union representing state workers, and has been designated by the state as the exclusive bargaining agent for certain employees of its executive branch. Under MSEA's collective bargaining agreement, it must provide certain administrative services for all of these employees, regardless of whether they elect to join the union. As a result, MSEA is entitled to receive a "service fee" (also known as an "agency fee") from those nonmember state employees whom it represents.[3] The state and MSEA negotiated a new collective bargaining agreement in 2005, which included a provision requiring all nonmember employees to begin paying this service fee as of July 1, 2005. The service fee is intended to be equal to the amount of union dues minus those expenses not related to the provision of collective bargaining and contract administration services.[4] In other words, MSEA is per-

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[3] This is called an "agency shop" arrangement. "An 'agency shop' agreement generally provides that while employees are not required to join the union, they are required to pay the union an amount equal to union dues." *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1126 n.1 (10th Cir.1991). Although it is undisputed that the appellant-employees in this case are not (and cannot be) required to pay the full amount of union membership dues, the arrangement is nonetheless referred to as an "agency shop." A related arrangement is referred to as the "union shop": a union shop describes an agreement requiring that all employees become members of the union. *Id.*

[4] The term "contract administration services" refers to all services undertaken by the union to carry out its obligations under the collective bargaining agreement. These services include settling disputes, processing grievances, administering the agreement, negotiating the agreement, and any other activities that are required by or closely related to the union's role as representative under the bargaining agreement. Throughout this opinion, when we refer to litigation related to collective

mitted to charge nonmember employees their share of all expenditures related to its services as the exclusive bargaining agent;[5] those MSEA expenditures that [52] are not related to bargaining and contract administration, such as political campaign donations or benefits provided only to members, cannot be "charged" to the nonmembers.[6]

MSEA initially sent notices to all nonmember employees in April and June 2005, providing a description of the service fee and how it was calculated. In July 2005, MSEA sent a superseding notice, accompanied by additional (and updated) financial information. The July notice calculated the service fee based

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bargaining, we include contract administration within the concept of collective bargaining.

[5] We use the term "chargeable" to refer to those union expenditures which may be included within the nonmembers' pro rata share of the costs of collective bargaining and contract administration. The costs of activities to which nonmembers cannot be compelled to contribute, such as political or ideological expressions or actions, are termed "nonchargeable." Both terms refer to whether a particular cost may be included in the union's calculation of the percentage of the membership dues that correlates to collective bargaining activity, and, therefore, that can be charged to nonmembers.

[6] MSEA's collective bargaining agreement with the state provides that those employees who were hired prior to July 2, 2003, and who elected not to join MSEA, would be "grandfathered" into the current service fee arrangement. Therefore, this group of nonmembers was required to pay only half of the service fee through June 2006. After that date, these "grandfathered" nonmembers had to pay the same service fee as all other nonmembers. Although this provision affected the actual size of the fee paid by the plaintiffs (who are all covered by the grandfathering clause), we do not factor this provision into our decision because the full service fee now applies to all employees.

on MSEA's 2004 fiscal year, the most recent year for which such data was available. In the July notice, as compared to the earlier April and June notices, MSEA opted to classify all of its organizing expenditures as nonchargeable; activities such as public relations and lobbying were also classified as nonchargeable.

MSEA's expenditures include the affiliation fee, *see supra* note 2, that it pays to the Service Employees International Union ("SEIU") to maintain its affiliation relationship with that organization. MSEA's July notice also included financial information for SEIU and classified as chargeable that proportion of its affiliation fee that represented SEIU's expenditures on chargeable activities. In other words, all of SEIU's activities that were comparable to those undertaken by MSEA, and which MSEA deemed chargeable in the calculation of the service fee, were included in the calculation of the proportion of MSEA's affiliation fee that could be charged to nonmembers.

MSEA included in its calculation of chargeable expenditures those costs of litigation (by both itself and SEIU) that was germane to collective bargaining. This meant that nonmembers contributed, through their service fees, to some litigation that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states. Included within this general category of expenditures were the salaries of SEIU's lawyers, and other costs of providing legal services to bargaining units throughout the country. Costs of litigation that was not related to collective bargaining, however, were not included in the service fees assessed to MSEA's nonmembers.

MSEA's July notice stated that 49.13% of the expenditures in its 2004 budget were chargeable to nonmembers; therefore, the service fee charged to nonmembers was 49.13% of the dues that members were required to pay. In addition to announcing the amount of the service fee, the July notice contained extensive additional information, such as: an affidavit from MSEA's Director of Finance explaining the calculation of the fee, a statement of all MSEA expenses classified into categories of chargeable and nonchargeable, an auditor's report on the statement of chargeable and non-chargeable expenses, and an independent auditor's report on SEIU's most recent financial statement (2003) on chargeable and nonchargeable expenses. The July notice also provided nonmembers with information on how they could challenge **[53]** the service fee if they disagreed with any of the expenditure allocations described within it. The notice informed nonmembers that if any nonmembers challenged the fee amount or calculations, all fees paid by nonmembers would be placed in an interest-bearing escrow account until arbitration was complete.

Some nonmembers did challenge the service fee and an arbitration was scheduled for all objections. The arbitration took place in December 2005, and the arbitrator issued a decision in May 2006, upholding MSEA's service fee calculation. In accord with the notice, all fees paid by nonmembers were held in escrow until after the arbitrator's decision was announced.

B. Procedural Background

Before the arbitration process was complete, the twenty appellant-plaintiffs in this case filed suit in the District of Maine under 42 U.S.C. § 1983, seeking class action status, injunctive and declaratory relief,

damages, and restitution. The employees then moved for a preliminary injunction, as well as class certification. After a hearing on the preliminary injunction motion, the district court denied it. Following the close of discovery, both parties moved for summary judgment. The district court granted summary judgment for the defendants, holding that "the inclusion of the cost of extra-[unit] litigation does not violate Plaintiffs' constitutional rights." The court also held that, because "the MSEA has placed all objecting nonmember service fees in an escrow account pending the ruling from the impartial arbitrator," there is "no constitutional violation." As the court explained: "the use of an impartial arbitrator and the escrowing of objectors' fees pending resolution of the complaint is sufficient to safeguard the nonmembers' constitutional rights" under Supreme Court precedent.[7]

On appeal, the nonmember employees raise only two issues.[8] First, they claim that SEIU's expenditures on litigation related to or on behalf of other bargaining units (also known as "extra-unit litigation" expenses) are not chargeable to nonmembers under the First Amendment because "the State of Maine has no 'compelling state interest' in SEIU's far-flung litigation activities nationwide." Second, the appellants claim that the "district court erred when it held that

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[7] Before the district court, the employees raised additional arguments, not at issue in this appeal. On these points, the district court held that MSEA's notice to nonmembers was constitutionally adequate, that nonmembers were given adequate time to object to the service fee, and that the indemnification clause in MSEA's collective bargaining agreement was lawful.

[8] Appellants' brief lists a putative third issue: whether the district court erred in holding that the class certification issue was moot. Because we agree with the district court's entry of summary judgment, we need not reach this issue.

the constitution imposes no obligation to calculate an adequate advance reduction of the fee."

II.

The first issue in this case—the chargeability of extra-unit litigation that is related to collective bargaining and that is subject to a pooling arrangement—requires us to examine a series of Supreme Court decisions and to resolve an area of uncertainty. Although none of the Supreme Court's opinions has squarely addressed the issue presented in this case, we explain below our view that the constitutionality of charging extra-unit litigation costs to nonmember employees turns on the same "germaneness" test that applies to all other **[54]** pooled services under *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

A. Origins of Supreme Court Doctrine

Over the course of the past thirty years, the Supreme Court has repeatedly addressed the First Amendment implications of "union shops" or "agency shops," where union membership, or service fee payment, is required as a condition of continued employment. *See supra* note 3. The early cases in this field dealt with railroads and their employees, after Congress passed a provision of the Railway Labor Act that required every employee working for a particular unit to provide financial support to the exclusive bargaining representative for that unit. *See, e.g., Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). Those cases upheld the constitutionality of the relevant provisions of the Railway Labor Act and concluded that Congress could impinge on employees' rights to free speech and

free association by requiring their payment of dues to a union, in order to promote peaceful labor relations and efficient labor representation. *Hanson*, 351 U.S. at 235-38, 76 S.Ct. 714; *Street*, 367 U.S. at 768, 81 S.Ct. 1784.

In *Street*, the Court held that Congress's permissible reasons for passing the statute meant that fees or dues could be required from nonmembers only insofar as those fees were related to the union's role as negotiator and administrator of the collective bargaining agreement. *Street*, 367 U.S. at 768-69, 81 S.Ct. 1784. Thus, it would be a violation of the First Amendment if Congress permitted railroads (or other private sector employers) to forcibly collect funds from employees in order to "finance the campaigns of candidates for federal and state offices whom [the nonmember employees] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." *Id.* at 744, 81 S.Ct. 1784. Given these principles, employers who designate a particular union as the exclusive bargaining agent for their employees cannot require those employees to subsidize or financially support the political or ideological activities of the union.

B. *Abood v. Detroit Board of Education*

In 1977, in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court considered a Michigan statute allowing local governments to create "agency shops." The Supreme Court thus faced the question whether, and to what degree, the constitutional implications of the agency shop arrangement were altered by the nonmembers' role as government employees. The Court concluded that the same legislative purposes underlay the state's and Congress' endorsement of an agency shop, mean-

ing that the same government interests were at stake in the two situations. *Id.* at 224-26, 97 S.Ct. 1782. The Court explained:

> To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, **[55]** the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, sub silentio.'

Id. at 222-23, 97 S.Ct. 1782 (quoting *Street*, 367 U.S. at 778, 81 S.Ct. 1784 (Douglas, J., concurring) (footnote omitted)). The Court also found that the same First Amendment interests in speech and association were at stake, regardless of whether the nonmember employees were employed by a state government or a private entity. *Id.* at 231-32, 97 S.Ct. 1782. Therefore, the *Abood* majority endorsed the same basic constitutional framework for government employees as had previously been adopted in *Hanson* and *Street*. *Id.* at 225-26, 235-36, 97 S.Ct. 1782.

C. *Ellis v. Brotherhood of Railway Clerks*

After the Supreme Court held in *Street* and *Abood* that nonmember employees' service fees could not be used to support political or ideological expression, the focus of litigation shifted to implementation of the general principles articulated in those cases. A series of subsequent cases required the Court to determine two key questions: what sorts of union activities qualify as political or ideological (and therefore are not chargeable to nonmembers), and what procedures must a union adopt to ensure that nonmembers' fees are used properly?

In *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), nonmember employees sued a union, claiming that its method of fee collection was unconstitutional. The union collected the same amount from all employees, including dues-paying members and fee-paying nonmembers. At the end of a fiscal year, it would then rebate a portion of the fee to the nonmembers, returning the amount of the fee that correlated to the union's expenditures on political or ideological activities (i.e., nonchargeable expenses). *Id.* at 439-40, 104 S.Ct. 1883. The Court held that the "pure rebate approach is inadequate." *Id.* at 443, 104 S.Ct. 1883. It explained that collection of the full dues amount, and rebate of the improperly collected funds, was tantamount to an "involuntary loan" by the nonmembers, and was impermissible because the union had other, less intrusive ways to collect the service fee. *Id.* at 444, 104 S.Ct. 1883. Although *Ellis* did not prescribe a particular method for collection of service fees from nonmember employees, it suggested (without requiring) that advance reduction of fees and interest-

bearing escrow accounts might be used to resolve the problem. *Id.*

Having declared invalid the procedure by which this union collected its funds, the Court then addressed the particular expenditures that were challenged by nonmembers. In evaluating these expenditures, the Court recognized that the agency-shop arrangement inherently entailed some "significant impingement on First Amendment rights" because the nonmember employees were, for the sake of peaceful labor relations, being required to "support financially an organization with whose principles and demands [they] may disagree." *Id.* at 455, 104 S.Ct. 1883. The Court nonetheless recognized that this infringement of constitutional rights had been permitted, by its prior decisions in *Hanson* and *Street*, because of the strong governmental interests at stake. With those preliminary considerations in mind, it articulated the standard for permissible charges to nonmembers as

> whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this **[56]** standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448, 104 S.Ct. 1883. Pursuant to this standard, only those expenditures arising from activities

related to the union's duty of representation to all of the employees in the bargaining unit could be charged to all employees.

One of the six specific expenditures at issue in *Ellis* was litigation costs. The Court held:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.

Id. at 453, 104 S.Ct. 1883. Consistent with *Ellis'* general definition of relevance (or "germaneness," as the Court would later describe it), which focuses on activities that are related to a union's collective bargaining duties, litigation expenses chargeable to nonmembers would also have to be related to the bargaining process *for the particular local unit.* Extra-unit litigation, by definition, could not satisfy this standard. *See* supra note 1.

D. *Chicago Teachers Union v. Hudson*

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court addressed one union's attempt to implement the *Ellis* decision. The union charged all nonmember employees a service fee equal to 95% of the dues required of members; the proportion was calculated based on the

union's expenditures on chargeable activities during the prior fiscal year. *Id.* at 295, 106 S.Ct. 1066. The union informed all nonmembers that they would be required to pay this amount and that they could object to the "proportionate share" (i.e., the fee calculation) in writing, if they did so within thirty days of the first payment. *Id.* at 296, 106 S.Ct. 1066. Once an objection was raised, a three-step process would begin. First, the union's executive committee would consider the objection. If the committee did not agree with the objection, the objector could appeal the issue to the union's executive board. Finally, if the objection remained unresolved, the union president would select an arbitrator, to be paid by the union, who would resolve the issue. An objector who prevailed at any of these levels would receive a rebate for the contested amount, and all future service fees would be reduced accordingly. *Id.* The issue in *Hudson*, therefore, was whether the union had taken sufficient precautions to prevent "'compulsory subsidization of ideological activity.'" *Id.* at 302, 106 S.Ct. 1066 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. 1782).

The Supreme Court began by observing once again that the government's interests in efficient and peaceful labor relations, while sufficient to permit enforcement of an agency shop policy, were not so great as to render the First Amendment [57] interests of nonmember employees irrelevant. Therefore, it stated that unions must devise a means to collect the service fee which would be "carefully tailored to minimize the infringement," and the nonmember employees must be given enough information and adequate procedural mechanisms to allow them to "identify the impact of the governmental action on [their] interests and to assert a meritorious First Amendment claim." *Id.* at 303, 97 S.Ct. 1782.

The Court first held that the union's fee collection was unconstitutional because it was functionally comparable to the pure rebate system that had been rejected in *Ellis*. *Id.* at 305, 97 S.Ct. 1782. Next, the Court held that the union's method of making an advance reduction of dues (the 5% reduction from the full dues amount) was inadequate because it failed to provide nonmembers with sufficient information to allow them to determine whether they wished to object. *Id.* at 306-07, 104 S.Ct. 1883. The Court emphasized that the union had a duty to provide an explanation of how the advance reduction was calculated and some expenditure information. *Id.* at 306-07, 104 S.Ct. 1883 & n. 18. The Court also held that placing the entire fee paid by nonmembers into an escrow account could not cure otherwise defective procedures (such as inadequate explanation of the fee or a biased dispute resolution procedure), but that a union must escrow the "amounts reasonably in dispute" pending the resolution of any objections raised by nonmembers. *Id.* at 310, 104 S.Ct. 1883. Finally, the Court held that the union must "provide for a reasonably prompt decision by an impartial decisionmaker" after a nonmember employee files an objection. *Id.* at 307, 104 S.Ct. 1883. Summarizing its conclusions, the Court held that the "constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 104 S.Ct. 1883.[9]

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[9] The Supreme Court recently decided *Davenport v. Washington Education Ass'n*, --- U.S. ----, 127 S.Ct. 2372, 168 L.Ed.2d 71

E. *Lehnert v. Ferris Faculty Association*

In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), the Court addressed, for the first time, the chargeability of "pooled expenses." The defendant union in *Lehnert* was a local affiliate of both a state union (the Michigan Education Association, or "MEA") and a larger, national union (the National Education Association, or "NEA"). It paid affiliation fees to the MEA and the NEA; these fees, along with the fees paid by all other local affiliates, were used by the state and national unions to support various activities at the state and national level. The affiliation fees also ensured the local unit's access to the MEA's and NEA's resources when the unit needed them (and the correlative availability of those resources to other local units when they were in need). The union passed a portion of its affiliation fees obligation on to nonmembers, by counting a percentage of the affiliation fees within the chargeable category of expenditures. **[58]** That chargeable category was calculated by dividing the MEA's and NEA's total expenditures by those expenditures it made on "chargeable" activities. The nonmember plaintiffs in *Lehnert* challenged the amount of the service fee, based on the inclusion of certain expenditures in the category of "chargeable" expenses.

(2007), in which it elaborated on the procedural requirements previously articulated in *Hudson*. *Davenport*, however, is not relevant here because it focused on the permissibility of a state statute imposing a requirement on unions operating under agency shop agreements that they obtain affirmative consent from nonmembers before spending those nonmembers' agency fees on election-related activities. *Id.* at 2379. There is no such issue in this case.

The *Lehnert* Court began by reviewing the relevant precedents and deriving from them a three-part test for determining whether a particular union expenditure is chargeable to nonmembers: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519, 111 S.Ct. 1950.[10]

The Court then analyzed the nonmembers' claim "that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit." *Id.* at 522, 111 S.Ct. 1950. It focused on the language from *Hanson* requiring that expenditures charged to nonmembers be "germane" to collective bargaining and concluded that such expenditures need not have "a direct relationship" to the nonmembers' bargaining unit in order to satisfy the germaneness prong of the chargeability test. *Id.* at 522-23, 111 S.Ct. 1950. The Court explained:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

Id. at 523, 111 S.Ct. 1950. Thus the nonmembers' service fees could include "their pro rata share of the

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[10] We refer to this three-part test as either the "chargeability test" or the *Lehnert* test."

costs associated with otherwise chargeable activities of [the local unit's] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 524, 111 S.Ct. 1950. In other words, the Court concluded that the use of a pooling or affiliation arrangement, with its requirement that a local union pay an affiliation fee to the state or national union, would not render expenditures that were otherwise chargeable (that , substantively relevant to collective bargaining) non-germane to the local bargaining unit.

The Court cautioned, however, that the permissibility of pooling arrangements "does not serve to grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Id.* The *Lehnert* Court, therefore, adopted a different standard of germaneness than that used by the *Ellis* Court. While *Ellis* defined germane activities as those directly related to the local unit's bargaining process, 466 U.S. at 448, 104 S.Ct. 1883, *Lehnert* recognized germaneness as having two distinct components: charged expenditures must be (1) substantively related to collective bargaining, and (2) "for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization," 500 U.S. at 524, 111 S.Ct. 1950. Thus, *Lehnert* defined germaneness more broadly to take account of the nature of affiliation relationships and the pooling [59] of resources characteristic of such relationships.

Although a majority of the Justices agreed on this general standard for evaluating the chargeability of pooled expenses, they did not reach agreement on the permissibility of charging nonmembers for extra-unit

litigation funded through a pooling arrangement. Justice Blackmun's majority opinion, joined in some parts by four other Justices, did not garner five votes for the paragraph discussing extra-unit litigation and is not controlling on that subject. *Id.* at 510, 528, 111 S.Ct. 1950. There, Justice Blackmun said that the costs of litigation "that does not concern the dissenting employees' bargaining unit" would not be "germane to the union's duties as exclusive bargaining representative." *Id.* at 528, 111 S.Ct. 1950.[11] Justice Blackmun concluded that extra-unit litigation, which does not involve the nonmembers' own unit by definition, was categorically not germane because it does not "concern" the union's role as bargaining agent for that specific unit. *Id.* He declined to apply the two-part germaneness test that he prescribed for other pooled expenses (requiring a substantive relationship to bargaining and a benefit conferred on the unit, through the reciprocal pooling arrangement), and specifically rejected the notion that such litigation might

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[11] Justice Blackmun's approach to extra-unit litigation was based on his view that such litigation was analytically similar to political lobbying or ideological expressive activities. He stated that extra-unit litigation is "more akin to lobbying in both kind and effect,"*Lehnert*, 500 U.S. at 528, 111 S.Ct. 1950 (plurality), because of its "political and expressive nature," *id.* He then concluded:

> Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extra-unit litigation, we hold that the Amendment proscribes such assessments in the public sector.

Id. (internal citations omitted).

be germane where it would "ultimately be of some use to" the particular unit. *Id.*

Justice Marshall, who concurred in part and dissented in part, wrote separately about the litigation issue and expressly noted that Justice Blackmun's paragraph on the topic was dicta. *Id.* at 544, 111 S.Ct. 1950 ("The [principal] opinion's discussion of extra-unit litigation costs is no more than dicta since . . . no such costs are at issue in this case.") (Marshall, J., concurring in part and dissenting in part). Justice Marshall also stated that he would reject any per se rule against charging for extra-unit litigation expenses, suggesting that such expenditures would be subject to the same germaneness test as other pooled resources (and thus would be potentially chargeable). *Id.* at 546-47, 111 S.Ct. 1950.[12]

Finally, Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy (in part), dissented and argued that the only chargeable costs are those arising from performance of the union's "statutory duties as exclusive bargaining agent." *Id.* at 550, 111 S.Ct. 1950 (Scalia, J., concurring in **[60]** part and dissenting in part). Justice Scalia rejected the "germaneness" test and argued that the governmental interest in preventing the "free rider" problem was

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[12] Justice Marshall observed that it is not entirely clear whether Justice Blackmun intended to endorse a per se rule against the chargeability of extra-unit litigation or whether he intended to allow for the possibility that some such litigation could be charged to nonmembers. 500 U.S. at 546-57, 111 S.Ct. 1950 (Marshall, J., concurring in part and dissenting in part). As indicated, we read Justice Blackmun's opinion as adopting a per se rule against the chargeability of extra-unit litigation costs. If he intended a more flexible approach, Justice Blackmun's articulation would permit charging for extra-unit litigation only in rare circumstances.

limited to the union's statutory duties to such potential free riders. In other words, the union could collect service fees only for its involvement in those activities that it was required by law to pursue. *Id.* at 556-57, 111 S.Ct. 1950. Justice Scalia did agree with the majority, however, that nonmembers could be charged for the costs of providing statutorily required services through a pooling arrangement. *Id.* at 561, 111 S.Ct. 1950 ("It would . . . be appropriate to charge the cost of [national-affiliate provided] services *actually provided* to [the local unit] itself, since they relate directly to performance of the union's collective-bargaining duty. It would also be appropriate to charge to nonunion members an annual fee charged by NEA in exchange for contractually promised availability of such services from NEA on demand."); *id.* at 562, 111 S.Ct. 1950 (explaining that pooled resources are chargeable where they provide a tangible benefit to the particular bargaining unit and its duties as exclusive representative, because there is a "tangible benefit . . . [in having] expert consulting services on call, even in the years when they are not used"). Justice Scalia did not mention extra-unit litigation specifically, most likely because no such charges were at issue in *Lehnert*. *Id.* at 544, 111 S.Ct. 1950 (Marshall, J., concurring).

In light of this fractured opinion, *Lehnert* did not resolve the specific question before us in this case: whether a union may charge nonmembers for expenses related to litigation conducted by a national affiliate, if the litigation is substantively related to the bargaining process and is funded through a pooling arrangement. *Lehnert* did provide the framework, however, for analyzing the question.

III.

Before applying the *Lehnert* test to the facts of this case, we review some of the decisions from other circuits which have addressed the chargeability to nonmembers of the costs of extra-unit litigation in light of the Supreme Court decisions that we have discussed.

A. Other Circuits' Decisions

In *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123 (10th Cir.1991) ("*PAID*"), a case decided shortly after *Lehnert*, the Tenth Circuit nevertheless relied heavily on *Ellis* in its analysis. The Air Line Pilots Association ("ALPA") charged nonmember employees of United Airlines for some of its costs associated with the litigation surrounding Continental Airlines' bankruptcy proceedings. *Id.* at 1127. ALPA claimed that these costs were properly chargeable because its success in the Continental litigation, which related to the Continental employees' collective bargaining rights, would generally strengthen the union, and thereby benefit the United bargaining unit. *Id.* at 1129. The Tenth Circuit rejected this argument because it applied the definition of "germaneness" articulated in *Ellis* and concluded that the Continental litigation did not "concern" or "relate to" the United bargaining unit. *Id.* at 1129-30.[13] The

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[13] The *PAID* court upheld the chargeability of pooled expenses for contract administration and bargaining. 938 F.2d at 1128-29. Therefore, the Tenth Circuit did not find the pooling arrangement itself problematic, but concluded, in the context of extra-unit litigation, that the particular litigation at issue in that case could not satisfy the germaneness test because it did not benefit the local unit. *Id.* at 1129. It is frankly unclear whether the litigation charges at issue in *PAID* were part of a pooling arrangement, or were simply expenses that nonmem-

[61] *PAID* court quoted from *Ellis* at length and concluded that only expenditures which "directly concerned" or "benefitted" the particular bargaining unit could be germane. *Id.* at 1130 ("In order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit."). Therefore, the court held that the "ALPA may not charge objecting United pilots for expenses incurred in litigation on behalf of the Continental bargaining unit" because the United unit did not benefit from that litigation. *Id.* at 1129. This approach effectively prevents unions from charging nonmembers for any extra-unit litigation because, by definition, extra-unit litigation will not directly involve or concern the nonmembers' unit.[14]

Four years later, the Sixth Circuit came to a different conclusion because it applied a different legal standard. In *Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir.1995), that court held that the *Lehnert*

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bers were asked to defray (without any specific reassurance that future litigation directly relating to their unit would be funded by other units, creating the reciprocity that was necessary to the *Lehnert* Court's approval of pooling arrangements). We assume, however, given the brief description of ALPA's method of calculating chargeable expenses, that the litigation was funded through a pooling arrangement.

[14] *PAID* does include some language that hints at the possibility of permitting some extra-unit litigation expenditures to be charged to nonmembers. *E.g.*, 938 F.2d at 1130 (stating that the extra-unit litigation costs were not chargeable because the union "failed to show that the litigation involving Continental was related to the plaintiffs' bargaining unit," thereby suggesting the possibility that other extra-unit litigation might be chargeable if such a relationship were shown). This suggestion creates an unresolved tension in *PAID* with the "directly concerned" or "benefitted" language in the opinion which reflects a per se approach to the extra-unit litigation issues.

chargeability test applies to extra-unit litigation expenses and that such expenses are, therefore, chargeable to nonmembers where they are shown to be related to collective bargaining and ultimately "inure to the benefit" of the local unit (as pooling arrangements inevitably do). In other words, the *Reese* court adopted the definition of germaneness articulated in *Lehnert*, rather than the narrower definition adopted in *Ellis*. This approach, in contrast to that taken in *PAID*, means that extra-unit litigation funded through pooling arrangements will be chargeable whenever it substantively involves collective bargaining because the affiliation relationship itself provides the required connection between the expenditure and the local unit. The *Reese* court examined the fractured *Lehnert* decision closely and found that the general approach to pooled expenses endorsed by the majority of the Supreme Court (i.e., that costs incurred through pooling arrangements could be charged to nonmembers if they were germane to collective bargaining) applied to extra-unit litigation, as it did to other pooled resources. *Id.*

Most recently, the Third Circuit addressed the chargeability of extra-unit litigation in *Otto v. Pennsylvania State Education Ass'n*, 330 F.3d 125 (3d Cir.2003), and aligned itself with the Sixth Circuit. In *Otto*, the nonmember employee-plaintiffs worked for a local school district and were required to pay agency shop fees to the local and state education associations. The plaintiffs claimed, among other things, that the local unit's expense pooling arrangement with the state association resulted in their payment of unconstitutional charges for extra-unit litigation. *Id.* at 128-29. The Third Circuit framed the **[62]** question before it this way: "[W]hether a union may charge non-members for their pro rata

share of expenses that relate to litigation and that were incurred on behalf of an affiliate union pursuant to a cost-sharing agreement." *Id.* at 135. The court noted that the *Lehnert* decision had not agreed on how such extra-unit litigation costs would fare under its definition of germaneness, meaning that there was no "definitive Supreme Court guidance." *Id.* at 136-38.

The *Otto* court applied the *Lehnert* germaneness test to the particular extra-unit litigation costs that the local union had charged to the nonmembers. It concluded that those expenditures provided a sort of insurance to the local unit by ensuring "the [future] availability of resources for [the unit's own] collective-bargaining-related litigation," and, in that way, inuring to the benefit of the local unit. *Id.* at 139. The court thus deemed the expenditures germane to the local unit's role as collective bargaining agent. *Id.* Under the second prong of the *Lehnert* chargeability test, the court said that "the free-rider concerns applicable to other pooled-expense arrangements apply with equal force to extra-unit litigation expenditures." *Id.* Finally, under the third prong of the test, the court concluded that where the pooled resources are being used for litigation that relates to collective bargaining, there would be "'little additional infringement of First Amendment rights beyond that already accepted.'" *Id.* (quoting *Ellis*, 466 U.S. at 456, 104 S.Ct. 1883). Therefore, the Third Circuit concluded that pooling arrangements for extra-unit litigation should be treated like other pooling arrangements, with costs chargeable to nonmembers so long as they satisfied the three-part *Lehnert* test, including the *Lehnert* definition of germaneness. *Id.*

B. MSEA's Extra-Unit Litigation Charges

In granting summary judgment for MSEA, the district court held "as a matter of law that the inclusion of the cost of extra-unit litigation does not violate Plaintiffs' constitutional rights." *Locke v. Karass*, 425 F.Supp.2d 137, 147 (D.Me.2006). It cited the decisions of the Sixth and Third Circuits, and stated that "[t]hose circuit courts that have ruled on the issue have found that it is constitutionally permissible for unions to include extra-unit litigation expenses in the service fees charged to nonmembers." *Id.* at 146-47.

The appellants argue that the district court failed to give due weight to the Supreme Court's earlier decision in *Ellis*, which stated that "[t]he expenses of litigation not having [ ] a connection with the bargaining unit are not to be charged to objecting employees." 466 U.S. at 453, 104 S.Ct. 1883. They claim that this language is dispositive and bars the union from charging nonmembers for any extra-unit litigation costs. In addition, they cite to Justice Blackmun's opinion in *Lehnert*, representing four Justices, and its endorsement of the *Ellis* per se prohibition on charging for extra-unit litigation, 500 U.S. at 528, 111 S.Ct. 1950, in support of their argument. They also contend that our decision in *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291, 299 (1st Cir.2000), is controlling here because, they say, it holds that charging nonmembers for litigation, other than that conducted by or for the particular bargaining unit, is unconstitutional.

In response, MSEA argues that *Ellis* is not relevant to this case because it did not address the chargeability of *pooled* resources, and its discussion of extra-unit litigation is therefore inapplicable to the

facts here. The union also challenges appellants' reliance on *Romero*, arguing that its discussion of chargeability for extra-**[63]**unit litigation was dicta.[15] MSEA urges us to adopt the reasoning of the Third and Sixth Circuits, finding that the three-part *Lehnert* test should apply to extra-unit litigation in the same way that it applies to all other pooling arrangements.

We agree with MSEA that both *Lehnert*'s germaneness definition and three-part chargeability test are applicable here. Like the Third Circuit, we believe the chargeability of extra-unit litigation "lies in the intersection of the *Ellis* and *Lehnert* holdings," 330 F.3d at 135. The *Ellis* decision holds that nonmembers cannot be charged for litigation that does not "concern" their own bargaining unit. 466 U.S. at 453, 104 S.Ct. 1883. While the language in *Ellis* suggests, at first blush, that only litigation by or for the particular bargaining unit involved can be charged to nonmembers, a closer reading of the opinion reveals a more limited holding. As *Otto* noted, the *Ellis* court was not confronted with a pooling arrangement, 330 F.3d at 136; its decision

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[15] *Romero* involved a challenge to certain expenditures by the Puerto Rico bar association, to which all lawyers in Puerto Rico are required to pay dues. We held that the chargeability test, articulated in *Lehnert*, 500 U.S. at 519, 111 S.Ct. 1950, applied to expenditures on ideological and non-ideological activities alike. 204 F.3d at 300-02. In the course of its discussion, the panel stated that the "[Supreme] Court also said that the union could not compel payment for litigation expenses not arising out of the contract or not normally conducted by an exclusive bargaining agent, despite the fact that there could be some indirect benefit to union members." *Id.* at 299 (citing *Ellis*, 466 U.S. at 453, 104 S.Ct. 1883). This sentence was dicta. Extra-unit litigation expenses were not at issue in *Romero*.

pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time.[16] *See also Lehnert*, 500 U.S. at 564, 111 S.Ct. 1950 (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting that *Ellis* "contains no discussion" of whether it would be permissible for a local unit to charge nonmembers for bargaining-related litigation "through a cost sharing arrangement under the auspices of the affiliate").

Moreover, the litigation that was deemed non-chargeable in *Ellis* was specifically defined as "litigation not involving the negotiation of agreements or settlement of grievances." 466 U.S. at 440, 104 S.Ct. 1883. Therefore, the import of the decision in *Ellis*, relying on a narrow definition of germaneness, is limited by its factual background (i.e., a direct funding arrangement).

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[16] Such "direct" contributions describe two means by which a local unit could contribute to extra-unit litigation outside of a pooling arrangement. First, the term encompasses direct donations to another local unit to support litigation efforts by that other unit. Second, the term also covers donations by a local unit to the national affiliate, above and beyond the amount of the affiliation fee, to be used to support litigation efforts. In other words, "direct contribution" describes any contribution to extra-unit litigation that is made outside of the normal affiliation fee or participation in a pooled resources arrangement. *Cf. Lehnert*, 500 U.S. at 524, 111 S.Ct. 1950 (distinguishing between pooled resources and "direct donation[s] or interest-free loan[s] to an unrelated bargaining unit," or "contribution[s] by a local union to its parent that is not part of the local's responsibilities as an affiliate but is in the nature of a charitable donation").

Lehnert addressed a different factual context—a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*, 500 U.S. at 523-24, 111 S.Ct. 1950. The best way to reconcile **[64]** *Ellis* and *Lehnert* is to recognize this distinction. *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert, Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Under *Lehnert*, an activity is germane if it is substantively related to bargaining and will "ultimately inure to the benefit of the members of the local union," 500 U.S. at 524, 111 S.Ct. 1950. Where a unit enters a pooling arrangement, the pool itself provides a benefit to the local unit. As noted in *Otto*, the pooling arrangement is akin to insurance, whereby the local unit contributes certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them. *See id.* at 522-24; *Otto*, 330 F.3d at 136 ("Even if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an expense-pooling agreement: the availability of on-call resources greater than those it could muster individually."). This arrangement, therefore, differs in kind from unilateral, nonreciprocal contributions to extra-unit litigation (of the sort at issue in *Ellis*), for which a bargaining unit would have no reasonable expec-

tation of any return benefit. The funding mechanism used is critical to a determination of which definition of germaneness ought to apply. The *Ellis* definition assumes, and thereby requires, a direct source of funding, whereas the *Lehnert* definition of germaneness assumes the existence of an affiliation or pooling relationship. As this case involves extra-unit litigation funded through a pooling agreement, we conclude that the *Lehnert* definition of germaneness should apply.

Although Justice Blackmun's treatment of extra-unit litigation costs in *Lehnert* did not command a majority of the Court and hence is not controlling, appellants rely heavily on it, and its grounding in *Ellis*. However, like some of Justice Blackmun's colleagues, we are not persuaded by his analysis. Justice Blackmun stated that "extraunit litigation [is] more akin to lobbying [than collective bargaining] in both kind and effect." 500 U.S. at 528, 111 S.Ct. 1950. He noted that union litigation "may cover a diverse range of areas from bankruptcy proceedings to employment discrimination," and concluded that it was essentially "political and expressive" in nature. *Id.* The *Lehnert* Court, consistent with the earlier decisions in *Hanson*, 351 U.S. at 238, 76 S.Ct. 714, and *Abood*, 431 U.S. at 235, 97 S.Ct. 1782, recognized that purely political or ideological expenditures could not constitutionally be charged to nonmembers. Therefore, once Justice Blackmun characterized extra-unit litigation as expressive and political, 500 U.S. at 528, 111 S.Ct. 1950, he had no need to apply the general chargeability test set forth in *Lehnert* to the costs of such litigation.

We think, however, that litigation is not susceptible to a single label. Some litigation may be purely

expressive, and therefore clearly outside the scope of chargeable activities. However, other litigation may be central to the negotiation and administration of a collective bargaining agreement. In this case, the appellants have not challenged MSEA's characterization of the litigation for which the nonmembers were charged as "related" to collective bargaining. There is no contention **[65]** that the litigation at issue is purely expressive or political.

Therefore, we apply the *Lehnert* three-prong test to determine whether MSEA's contributions to SEIU's litigation efforts were properly chargeable. If the SEIU litigation was "germane" to MSEA's collective bargaining duties, as that term was defined in *Lehnert*, if it was justified by the government's interests in labor peace and prevention of free riders, and if it did "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop," 500 U.S. at 519, 111 S.Ct. 1950, the costs of MSEA's contribution to that litigation were chargeable to the appellants.

The appellants have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy this test. Instead, relying on *Ellis*, and Justice Blackmun's treatment of extra-unit litigation costs in *Lehnert*, they have argued only that, as a matter of law, extra-unit litigation could not be deemed "germane," and hence the costs associated with it could not be charged to nonmembers. Having rejected that argument, we are bound to conclude that the costs at issue here do satisfy the chargeability test, as there has been no dispute regarding the second and third prongs of the test.

In addressing this extra-unit litigation issue, the district court held "as a matter of law[,] that the inclusion of the cost of extra-[unit] litigation does not violate Plaintiffs' constitutional rights." 425 F.Supp. 2d at 147. Viewed in isolation, apart from the arguments framed by the parties, that language might be read to endorse a per se rule that all extra-unit litigation can be charged to nonmembers. However, as we have noted, the parties did not dispute whether the litigation charges were "germane," as that term was defined in *Lehnert*. Therefore, the district court must have assumed, consistent with the representations made to it, that the extra-unit litigation charges before it were "germane" within the meaning of *Lehnert*. On the basis of that understanding, we agree with the district court's disposition of the extra-unit litigation issue.

IV.

Appellants also claim that the district court erred in finding no flaw in the process used by MSEA to assess the nonmember fee. They argue that *Hudson* implicitly, if not explicitly, imposed a requirement that unions make an advance reduction of the service fee based on the percentage of expenditures that are classified as nonchargeable. They further argue that the calculation must be done in "good faith."

As already noted, MSEA did make an advance reduction, assessing approximately 49% of its members' dues as a service fee on nonmembers. Given that fact, we decline to consider whether such a reduction is mandatory under *Hudson*.[17] The only

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[17] The district court's order denying a preliminary injunction held that an advance reduction was not required. *Locke v. Karass*, 382 F.Supp.2d 181, 191 (D.Me.2005) ("Assuming the

remaining issue before us, therefore, is the method by which the service fee is calculated. However, appellants' challenge to the method of calculation is simply a reiteration in different terms of their challenge to the constitutionality of extra-unit litigation charges. That is, appellants **[66]** claim that the definition of "chargeable" was excessively broad because it included extra-unit litigation expenditures. They have not identified any procedural defects in the notice and explanation that MSEA provided to nonmembers. They also have not disputed any discrete charges based on the facts or circumstances of the expenditure. There is no second issue to decide.

V.

In the aftermath of the Supreme Court's decisions in *Ellis* and *Lehnert*, we understand the uncertainty about the constitutionality of charging nonmembers of a union for the costs of extra-unit litigation. However, for the reasons described above, we find that *Lehnert* and *Ellis* can be reconciled by identifying the mechanism by which a local unit contributes to extra-unit litigation. Where extra-unit litigation is funded through direct contributions, as in *Ellis*, nonmembers may not be charged for those expenditures. Where the litigation is funded through a pooling arrangement, the broader *Lehnert* definition of germaneness applies and the affiliation relationship between the state or national union and the local unit will be sufficient to demonstrate that

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union's notice is adequate enough to protect nonmembers' ability to determine whether to object, *Hudson* holds that an impartial arbitrator and the escrowing of objectors' fees pending resolution of the complaint is sufficient to safeguard the nonmembers' constitutional rights."). Appellants focused on this ruling in their brief, despite its mootness.

the expenditures will "inure to the benefit" of the local unit; thus, in these situations, charges will be germane so long as the litigation at issue relates to the bargaining process.

The facts in this case are not disputed. The extra-unit litigation costs were funded through a pooling arrangement and were substantively related to the bargaining process. Those costs are chargeable to the nonmember appellants without offending the First Amendment of the Constitution.

Affirmed.

LYNCH, Circuit Judge, joining and concurring.

The National Right to Work Legal Defense Foundation, representing non-unionized Maine state employees, brought this case in the hopes of persuading the Supreme Court to resolve an issue that the Court left unanswered in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), and on which the circuit courts differ.

Unions that take on the role of exclusive bargaining representative according to the terms of a collective bargaining agreement owe a duty to bargain on behalf of all employees. Indeed, once the union has been certified as the exclusive bargaining representative, the employees may not negotiate independently with management. Unions secure collective goods for those employees, such as higher wages, benefits, and job security. *See generally* D. Leslie, *Labor Bargaining Units*, 70 Va. L.Rev. 353, 354-60 (1984). All employees enjoy at least some of the fruits of a union's efforts, but only union members pay union dues.

Union security mechanisms such as agency shop agreements combat this free rider problem by ensuring that nonmembers who benefit from the union's collective bargaining activities pay their fair share to support the union. *Id.* at 379; *see also Commc'ns Workers v. Beck*, 487 U.S. 735, 747-54, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) (discussing role of free rider problem in legislative history of the National Labor Relations Act and the Railway Labor Act). An agency shop agreement requires "that employees, as a condition of continued employment, must either become members of the union, with the attendant dues obligation, or pay the union a service

fee." 2J. Higgins, *The Developing Labor Law* 2143-44 (5th ed.2006). That fee, as is true in this case, is typically less than the fee union members pay and **[67]** covers the cost of those common benefits that non-union employees have derived.

Compelling government employees to pay union fees raises constitutional issues. The First Amendment forbids a public employees' union from requiring payment by nonmembers of fees used to support ideological activities not "germane to its duties as collective bargaining representative." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). The limits of "germaneness," which lie between the poles of union expenditures for purely ideological activities and expenditures for core collective bargaining activities, lead to much litigation between unions and nonmember employees. *See, e.g.*, R. Gorman & M. Finkin, *Basic Text on Labor Law* 921-27 (2d ed.2004).

Maine law allows agency shop agreements, as the National Labor Relations Act permits the state to choose to do. *Opinion of the Justices*, 401 A.2d 135, 147-48 (Me.1979); *see also* 29 U.S.C. § 152(2) (exempting government employers from the NLRA); *Davenport v. Wash. Educ. Ass'n*, --- U.S. ----, 127 S.Ct. 2372, 2376, 168 L.Ed.2d 71 (2007). The Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("Local 1989"), includes in its calculation of expenses chargeable to nonmembers some portion of the affiliation fees the local pays to SEIU, its national parent union. The agency fees may include only that portion of these so-called "extra-unit expenses" for activities "germane" to the local bargaining unit.

The actual sums involved here help set the context of this dispute. As of July 2005, members of Local 1989 paid biweekly union fees of $18.20. Nonmember employees subject to the "full fair share" agency fee were charged $8.94 each biweekly pay period. Plaintiffs themselves were "grandfathered" nonmembers assessed only 50% of the usual agency fees, or $4.47 biweekly, until June 2006.

A portion equal to 13.86% of the Local's agency fees was attributable to extra-unit expenditures (i.e. affiliation fees paid to SEIU). The national union accounted for 12.08% of that sum as "professional fees and expenses." That line item represents 1.67% of the agency fees charged to employees that did not join Local 1989. For nonmember employees charged their "full fair share," that amounts to a charge of $.15 biweekly—or $.30 per month—for all professional services charged by the national union to Local 1989. An undefined proportion of the extra-unit professional expenses are attributable to litigation. Thus, the maximum monetary amount at issue in this case is less than fifteen cents each month to each of the plaintiffs when they were grandfathered, and less than thirty cents to other nonmembers paying agency fees.

The very narrow issue raised by this case is whether Local 1989's agency shop fees must exclude SEIU's extra-unit *litigation* expenses from the usual rule for calculating chargeable extra-unit expenses. *Lehnert* ruled that chargeability of extra-unit expenses is subject to "a case-by-case analysis." 500 U.S. at 519, 111 S.Ct. 1950. Chargeable activities must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free

riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an [agency shop]." *Id.* There is no dispute that the extra-unit litigation by SEIU was "germane" in that pertinent sense. The question plaintiffs present is a categorical one—are extra unit *litigation* expenses so different from other—extra-unit expenses that they should per se be treated differently **[68]** for agency fee purposes? As described well in Judge Lipez's opinion, *Lehnert* did not directly answer the question. I think the answer is, clearly, "No."

The First Amendment is not violated by allowing extra-unit litigation expenses to be charged according to the same criteria of germaneness as other extra-unit expenses. Extra-unit litigation expenses are not analytically different from other pooled extra-unit expenses. *See Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1016 (7th Cir.1998) (Posner, C.J.) (noting that in challenge to extra-unit fees, litigation expenses were "treated separately by the parties but [are] analytically identical, as far as we can see"). The National Labor Relations Board, an administrative body with particularized expertise in administering labor disputes under the NLRA, has so held for over a decade. *California Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995).

The free rider problem, which justifies both local and extra-unit agency fees, exists equally for litigation costs as for other extra-unit costs. Extra-unit litigation can create common benefits or avoid common detriments. Litigation conducted by national unions frequently establishes precedent that redounds to the benefit of a union local and the employees it represents, even when the local is not a named party. For example, terms within a collective

bargaining agreement may not yet have been established as having a particular meaning, and extra-unit litigation could establish a union-friendly definition. Or a local may believe that a particular practice common to its segment of an industry is an actionable unfair labor practice and contractual violation, but the national may decide for strategic reasons that a lawsuit is better brought with an extra-unit plaintiff.[18] In return for these considerable benefits, a local union need pay an affiliation fee to the national. There is no reason to think, and no evidence presented by the plaintiffs to prove, that the free rider problem is eliminated simply because the common extra-unit benefit is obtained through litigation. In fact, such a position "overlooks the economic interdependence of bargaining units." *Int'l Ass'n of Machinists*, 133 F.3d at 1016.

Further, if a particular extra-unit lawsuit is too remote and indirect in benefit to a local bargaining unit, or if a national union brings a suit for purposes totally unrelated to its collective bargaining duties, that problem may be addressed by a particularized germaneness inquiry. The existence of this mechanism to determine germaneness itself argues against any per se exclusion of extra-unit litigation expenses. If a case is brought to advance a political position, then the *Lehnert* rule itself will exclude that litigation from the agency fee.

A contrary rule would result in significant practical detriment for both local and national unions.

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[18] Another benefit to a local of contributing fees to the national's litigation fund is that one day that fund may be mobilized to help resolve the local's own bargaining disputes. *See Otto v. Penn. State Educ. Ass'n*, 330 F.3d 125, 138-39 (3d Cir.2003).

Adopting plaintiffs' proposed rule would lead to reducing unions' ability to draw on funds for litigation related to collective bargaining. There would be a concomitant reduced capacity to bargain effectively on behalf of all employees. Ultimately, chipping away at the scope of properly chargeable expenses could jeopardize the income stream of unions. *Cf.* R. Posner, *Some Economics of Labor Law*, 51 U. Chi. L.Rev. 988, 1004 (1984).

Under *Lehnert*, the marginal burden on the First Amendment rights of non-union employees imposed by adding germane extra-unit **[69]** litigation fees to the agency fee is minimal. On the facts here,[19] the financial burden for extra-unit litigation costs is very small. The added burden on the plaintiffs' expressive and associative rights could not amount to any significant diminution—let alone infringement—of First Amendment rights.

The proposed categorical rule could be viewed in another dimension. All of the affected parties need a clear set of rules by which to operate. It could be argued that a flat rule prohibiting all extra-unit litigation from being chargeable to non-union employees would be easily administrable and therefore economically efficient. But given that some of SEIU's extra-unit expenses can be charged to nonmembers, it is unclear why the deletion of one component of that charge-back would make the system materially easier to administer. Indeed, there is no evidence in this record that any additional administrative costs

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[19] Hypothetically, those costs on the facts in a given case could be so burdensome, and the benefits so attenuated, that there could be a First Amendment violation. Our concern here is not with an extreme case but with whether to adopt a categorical rule.

are imposed by charging back germane extra-unit litigation expenses. This tracking and allocation of litigation expenses is a routine accounting matter.

A great many resources have been spent thus far on the issue here and elsewhere. Decision of this issue by the Supreme Court would provide needed clarity.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MAINE

[Filed March 31, 2006]

No. 05 CV 112 P S.

DANIEL B. LOCKE, et al.,
Plaintiffs,

v.

EDWARD A. KARASS, State Controller, et al.,
Defendants.

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[139] Stephen C. Whiting, Whiting Law Firm, PA, Portland, ME, W. James Young, National Right To Work Legal Defense Foundation, Springfield, VA, for Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson and Beth L. Weirich, Plaintiffs.

Philip J. Moss, Moon, Moss, & Shapiro, PA, Portland, ME, William H. Laubenstein, III, Office of the Maine Attorney General, Augusta, ME, Jeffrey Neil Young, McTeague, Higbee, Case, Cohen, Whitney & Toker, PA, Topsham, ME, Robert W. Alexander, Jeremiah A. Collins, Bredhoff & Kaiser, PLLC, Washington, DC, for Edward A. Karass, State Controller; Rebecca M. Wyke, Commissioner, Department of Administrative and Financial Services;

Kenneth Walo, Director, Bureau of Employment Relations; and MSEA Local 1989, Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC; Defendants.

[140] ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, ORAL ARGUMENT, MOTION FOR LEAVE, AND RENEWED MOTION FOR CLASS CERTIFICATION

SINGAL, Chief Judge.

Before the Court are three motions for Summary Judgment: the Motion for Summary Judgment filed by Defendants Edward A. Karass, Controller of the State of Maine, Rebecca M. Wyke, Commissioner of the Maine Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Bureau of Employee Relations of the State of Maine ("State Defendants") (Docket # 64); Plaintiffs' Motion for Summary Judgment (Docket # 67) and associated Motion for Oral Argument/Hearing (Docket # 74); and the Motion for Summary Judgment filed by Defendant Maine State Employees Association ("MSEA" or "Union") (Docket # 73). In connection with these motions, Plaintiffs also filed their Motion for Leave to Exceed Page Limits in Support of their Motion for Summary Judgment and in Opposition to Defendants' Motions for Summary Judgment ("Motion for Leave") (Docket # 89).

For the reasons laid out below, the Court GRANTS Plaintiffs' Motion for Leave,[1] DENIES Plaintiffs'

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[1] Although the Court is troubled by Plaintiffs' flagrant violation of Local Rule 7(e) in submitting a Motion for Summary Judgment (Docket # 67) more than double the page limit with-

Motion for Summary Judgment and Oral Argument, and GRANTS Defendants' Motions for Summary Judgment.

In addition to the cross-motions for summary judgment, there is also pending before the Court Plaintiffs' Renewed Motion for Class Certification (Docket # 55). At the February 1, 2006 hearing on this Motion, the Court indicated that it would reserve ruling on the issue of class certification until after it had ruled on the pending motions for summary judgment. In light of the Court's decision on these motions for summary judgment, the Court concludes that Plaintiffs' Renewed Motion for Class Certification is MOOT.

I. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A "material fact" is one that has "the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir.1993). The Court views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's

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out leave of the Court, it finds that reading the entirety of the filing does not change the outcome of the Order, and therefore considers it.

favor. *See McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.1995).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. [141] *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir.2004). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmoving party must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir.1999) (citation and internal punctuation omitted); Fed.R.Civ.P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir.2001) (citation and internal punctuation omitted).

This standard is not altered by the fact that cross-motions for summary judgment have been filed in this case. *See, e.g., Blackie v. State of Me.*, 75 F.3d 716, 721 (1st Cir.1996). In the context of this case, the Court notes that the relevant facts are essentially undisputed. Nonetheless, based on the Court's determination that Defendants are entitled to summary judgment, below the Court resolves any factual disputes and make all rational inferences in favor of

Plaintiff. *See Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir.2005).

II. BACKGROUND

Since 1979 the State of Maine ("the State") has had a collective bargaining agreement with Defendant MSEA. The MSEA is the exclusive bargaining agent for state Employees within four Bargaining Units: Administrative; Operations, Maintenance, and Support; Professional and Technical; and Supervisory Services ("Bargaining Units"). Prior to 2003, State Employees who worked in one of these Bargaining Units ("Employees") and were members of the MSEA were required to pay union dues as a condition of employment. State Employees who worked within one of the Bargaining Units but who were not members of the MSEA ("Nonmembers") were not required to join or make any payments to the MSEA. This changed in 2003 when the MSEA and State agreed to place a "union security" provision in the 2003-2005 collective bargaining agreement. This provision required that all newly hired Employees either become union members or pay a "service fee" to the MSEA. (See Agreement Between the State of Maine and the Maine State Employees Association, 2003-2005 (Docket # 71, Ex. 2) at 80-86.) The service fee was defined as an amount that each Nonmember must pay for his or her share of the MSEA's collective bargaining and contract administration costs. (*See Id.* at 80-81.)

The 2005-2007 collective bargaining agreement (the "CBA") between the MSEA and the State extended this service fee requirement to all Nonmember State Employees. (*See* Agreement Between the State of Maine and the Maine State Employees Association, 2005-2007 (Docket # 71, Ex. 2) at 55-60.)

The CBA outlined the procedural requirements that the MSEA would follow in calculating and promulgating the fee. These requirements included notice, financial disclosure, and an opportunity to dispute the fee. (*Id.*) The CBA contained a "grandfather clause" provision, which allowed Nonmembers hired prior to July 2, 2003 to pay only 50 percent of the service fee until June 2006. The named Plaintiffs in this case are grandfathered Nonmembers under this provision.[2] **[142]** The CBA also included an indemnification provision, whereby the MSEA agreed to indemnify the State for any liability it might incur as a result of the service fee provision. (*Id.* at 59-60.)

On April 11, 2005, the MSEA sent a letter to all Employees notifying them of the new service fees, with a four-page attachment containing an explanation of membership, dues, and fees. (*See* April 11, 2005 Letter to MSEA-SEIU Bargaining Unit Members (Docket # 71, Ex. 3) (hereinafter "the April Notice").) The letter gave the amount of the then-current fee, $6.71 per week, and stated that the full membership fee was only $2.39 more per week. This would make the service fee approximately 73.7% of the membership fee. The letter advised members, however, that "a new fee amount will be implemented in August, based on the Union's 2004 expenditures." (*Id.* at 2.)

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[2] The Plaintiffs in this case are currently being charged only 50 percent of the service fee, which amounts to only 24.57 percent of member dues. The Court is not convinced that Plaintiffs have established injury under this reduced amount, but nonetheless chooses to disregard this possibility, and assumes for purposes of this Order that the full service fee is at issue.

On June 10, 2005, the MSEA mailed a letter to all Employees. (*See* June 10, 2005 Letter re: Verified Statement of Certain Rights Regarding Dues and Fees (Docket # 71, Ex. 4) (hereinafter "the June Notice").) The letter explained that the service fee reflected "the pro-rata costs of the Union's expenditures that are germane to its representative activities." (*Id.* at 2.) Union expenses were categorized as "chargeable" or "non-chargeable." Chargeable categories included contract bargaining, administration, and enforcement; publicity and community mobilization in support of public bargaining; litigation related to the union's representational activities; certain types of training; union governance costs; organization and recruitment; certain personnel costs; certain accounting, auditing, and professional consulting fees; and certain administrative expenses. (*Id.* at 2-4.) Each listed category had a paragraph-long explanation, with examples, of the activity that fell under each category. The Affidavit of Joan Towle, the Director of Finances of the MSEA, was attached to the letter. In it, she stated that based on the MSEA's "audited financial statements for the year 2004," the service fee would be 70.6 percent of the membership dues. (*Id.* at 6.)

On June 16, 2005, Plaintiffs filed their Complaint (Docket # 1), initiating this action. On July 12, 2005, MSEA sent a notice to all Nonmembers. (*See* July 12, 2005 Letter re: Payment of Service Fees to MSEA-SEIU (Docket # 71, Ex. 5) (hereinafter "the July Notice").) The July Notice announced the MSEA's decision to reclassify the union's organizing-related expenditures as non-chargeable to Nonmembers. As these organizing expenditures were a large portion of the MSEA's budget, the service fee was reduced to 49.13 percent of member dues. Grandfathered Non-

members were to pay half that, or 24.57 percent of member dues. This letter gave an even more detailed analysis of the chargeable and non-chargeable categories, and additionally included an audited statement of the exact dollar amount spent by the MSEA in each category. (*Id.* at 3-7, 10.) It also included a copy of the independent auditor's report, which assured Nonmembers that the recategorization and new calculation of the service fee were consistent with the audited financial data from the June Notice. (*Id.* at 11-19.)

In the July Notice the MSEA gave nonmembers an opportunity to challenge the service fees by August 16, 2005. (July Notice (Docket # 71, Ex. 5) at 6). However, pursuant to the July Notice, which stated that fees would be collected starting with the first payroll period after July 1, the MSEA began collecting service fees from Nonmembers on July 27, 2005. (*Id.* at 1.) As it is unclear whether the objection had to be lodged before the service fee payment was due, the Court, for purposes of summary judgment, assumes that the *de* **[143]** *facto* deadline for objecting was July 27, 2005.

In fact, a number of Nonmembers have challenged MSEA's calculation of the service fee, and a hearing on those challenges was held in December 2005 before an independent arbitrator. The arbitrator has not yet issued a decision, and the MSEA has placed all collected service fees in an independent escrow account pending the arbitrator's decision. No employee has been terminated for failing to pay the service fee.

On August 8, 2005, Plaintiffs filed their First Amended Complaint (Docket # 47). In it, they allege first that Defendants have violated their First, Fifth,

and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983, and second, that Defendants have entered into an indemnification agreement that is null and void as against public policy.

On October 18, 2005, the State and the MSEA agreed to alter the indemnification clause of the CBA. (*See* 2005-2007 Agreement Between the State of Maine and the MSEA-SEIU (Docket # 66, Ex. A).) The new language inserted in the clause stated that although the MSEA agreed to indemnify the State for any liability costs it might incur from enforcing the service fee provision, "nothing herein shall require Indemnification for any intentional deprivation of an individual's constitutional rights by the State." *Id.* at 2.)[3]

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[3] The entirety of the indemnification provision, with the October 18 addition in bold, reads:

> MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless (collectively, "Indemnification") against any claim, demand, suit, cost, expense, damages, or any other form of liability, including attorneys' fees, costs, or other liability arising from or incurred as a result of any act taken or not taken by the State, its members, officers, agents, employees, or representatives in complying with or carrying out the provisions of this Article, including, but not limited to, as a result of being ordered to reinstate an employee terminated at the request of MSEA-SEIU for not paying the service fee; in reliance on any notice, letter, or authorization forwarded to the State by the union pursuant to this Article; and including but not limited to any charge that the State failed to discharge any duty owed to its employees arising out of the service fee deduction; **provided that, nothing herein shall require Indemnification for any intentional deprivation of an individual's constitutional rights by the State.** MSEA-SEIU will intervene in and defend any administrative or court litigation concerning the pro-

III. DISCUSSION

A. 42 U.S.C. § 1983

Plaintiffs' first claim is that Defendants, under the color of Maine law, violated 42 U.S.C. § 1983 by violating Plaintiffs' First, Fifth, and Fourteenth Amendment rights under the United States Constitution. Specifically, Plaintiffs claim that Defendants failed to provide Nonmembers constitutionally adequate notice and explanation of the service fee and how it was calculated, in both the April and July Notices, in violation of the requirements laid out in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Even viewing the record in the light most favorable to Plaintiffs, the Court does not find that Plaintiffs have presented a trialworthy issue on this claim. Plaintiffs raise a number of distinct issues, all arising under 42 U.S.C. § 1983, and the Court addresses them in turn.

1. Constitutionality of Service Fees

The Supreme Court long ago laid out the standards used to determine the **[144]** constitutionality of union service fees. In 1977, the Court found that collective bargaining agreements between unions and public employers may require nonmember public employees to make payments to the union. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223-224, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). This is to avoid the possibility of "free riders," or employees who might take advantage of the union's services without contributing financially to the union. *Id.* However, unions may not

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priety of any act taken or not taken by the State, including, but not limited to, termination for failure to pay the service fee. In such litigation the State shall have no obligation to defend its act taken or not taken.

simply charge whatever amount they choose in service fees. In *Hudson*, the Supreme Court found that unions must follow certain procedures in calculating and collecting the fee in order to protect the First Amendment speech and associational rights of nonmembers. These constitutional requirements include providing (1) "an adequate explanation of the basis for the fee," (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. 1066.

In *Hudson*, the Supreme Court ruled that the local teacher's union failed to meet these constitutional requirements in setting a service fee for nonmember. There, pursuant to a collective bargaining agreement with the city, the union set the service fee for nonmembers at ninety-five percent of the dues charged to members. *Id.* at 295, 106 S.Ct. 1066. The union did not, however, provide nonmembers with adequate information about the basis for the union's calculation of their proportionate share. *Id.* at 306, 106 S.Ct. 1066.

Although the Court found that "absolute precision" in the calculation of the fee "cannot be expected or required" (*Id.* at 307 n. 18, 106 S.Ct. 1066), unions must detail those expenditures, including collective bargaining and contract administration, that benefit nonmembers and therefore warrant a fee collection. *Id.* at 306, 106 S.Ct. 1066. This disclosure should include "major categories of expenses" and "verification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. 1066. While the union in *Hudson* failed to provide this information, the MSEA did not. As required, the MSEA provided details of the fee calc-

ulation to all Nonmembers, allowing them sufficient information to determine whether or not they wanted to challenge the amount. *Id.* at 306, 106 S.Ct. 1066.

2. MSEA's July Notice Supersedes All Previous Notices

In this case, Plaintiffs specifically challenge the constitutionality of both the April and July Notices. As was discussed extensively in the Court's Order on Motion for Preliminary Injunction issued on August 2, 2005, the Court finds that the July Notice superseded the April Notice, and therefore mooted Plaintiffs' claims regarding the April notice. *See Locke v. Karass*, 382 F.Supp.2d 181, 187-89 (D.Me.2005). It is also worth noting that Defendants' June Notice, sent to Employees six days before Plaintiffs filed their first Complaint, superseded the April Notice as well. The June Notice included notice of the service fee, a breakdown of chargeable and non-chargeable categories, and information on how to challenge the fee. Defendants' July Notice corrected any deficiencies that may have existed within the April or June Notices, and was sent two weeks before objections to the service fees were due. The Court does not find any trialworthy issues as to the April or June Notices and determines, as it did at the Preliminary Injunction stage, that any constitutional deficiencies in the April Notice were mooted by the July Notice.

[145] 3. The July Notice was Constitutionally Sufficient Under *Hudson*

a. The Independent Audit and Financial Data were Sufficient

The Court has also previously addressed a number of Plaintiffs' arguments regarding the July Notice. Considering the summary judgment record, the

Court remains assured that the independent audit of the MSEA's financial disclosures could be considered either a review (under *Hudson*) or an audit (under *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-1107 (9th Cir.1999)), and is legally sufficient under either alternative. The letter from the auditor included in the July Notice (July Notice at 11) establishes that a full audit of the MSEA's 2004 fiscal year, under either *Hudson* or *Prescott*, took place. The Court also finds that the July Notice used data from the most recent year in which audited data was available; in this case, 2004 data from the MSEA and 2003 data from its national affiliate, the Service Employees International Union ("SEIU"). The Court does not find any legal authority for Plaintiffs' argument that the financial data used in the service fee calculation must be from the immediately prior fiscal year; the data available from the most recent fiscal year in which audited data is available is sufficient. The Court therefore does not find that the financial data used in assessing the service fees is stale. In short, the audits undertaken by the MSEA and the SEIU are wholly sufficient.

Plaintiffs have also argued that the audit was insufficient because no new audit was undertaken following the MSEA's decision to recategorize organizing expenses from chargeable to non-chargeable. As previously explained in the Order on Motion for Preliminary Injunction, *Hudson* does not require a union to undertake a new audit when it makes a decision to recategorize an expense. A decision to recategorize an expense as non-chargeable is solely within the purview of the union, and not the auditor. *Locke*, 382 F.Supp.2d at 189.

Nonetheless, the MSEA had its independent auditor examine the recalculation and confirm that it properly utilized the 2004 financial data, which had previously been fully verified by the auditor, in making its calculation. The Court remains satisfied that this undertaking by the auditor fully satisfies, and may surpass, the requirements of *Hudson*.

b. Plaintiffs Were Given Adequate Time to Challenge the Service Fees

Although the announced deadline for objecting to the service fee was August 16, 2005, Plaintiffs insist that any deadline that fell after the July 27th due date for payment of the initial service fee is insufficient. Plaintiffs' position therefore appears to be that objections can only truly be filed prior to the service fee due date. Thus, Plaintiffs argue that the July Notice, which was sent on July 12, 2005, did not give Nonmembers adequate time to determine whether or not to challenge the service fee. The Court previously found that the two-week period between July 12, 2005 and July 27, 2005 was an adequate amount of time for a Nonmember to determine whether or not to challenge the service fee. To date, Plaintiffs have presented no explanation as to why this two-week period is unreasonable and inadequate. In short, at the very least, Nonmembers had two weeks prior to the July 27th payment deadline to review the July Notice and to make a decision about whether to challenge the fee. The Court concludes that, in the circumstances of this case, two weeks is an adequate amount of time to make that determination.

[146] c. The SEIU Data was Constitutional Under *Hudson*

Next, Plaintiffs claim a violation of 42 U.S.C. § 1983 based on the MSEA's continuing to include organizing activity within the calculation of the service fee in violation of *Hudson*. Although Plaintiffs allege that the MSEA is charging Nonmembers for organizing by both the MSEA and the SEIU, as well as for the publicity in support of organizing activity, the summary judgment record does not support this allegation. In fact, the July Notice specifically prohibits charging Nonmembers for such activity.

The July Notice included the MSEA's financial information as well as the entire SEIU auditor's statement, including the auditor's notes. Plaintiffs concede in the July Notice that payments made by the SEIU to local affiliates were treated as chargeable when made to reimburse operating expenses, and non-chargeable when made to subsidize organizing activities.[4] Plaintiffs do not make any

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[4] In Plaintiffs' Opposing Statement of Material Facts in Opposition to Defendant MSEA's Motion for Summary Judgment (Docket # 86) ("Plaintiffs' MSEA Response SMF"), Plaintiffs respond to Defendant MSEA's Statement of Material Facts as to Which There is No Genuine Issue (Docket # 70) ("MSEA's SMF"). MSEA's SMF at ¶ 18 states (with citations omitted): "The July Notice included the entire SEIU auditor's statement of the allocation of expenses for the 2003 fiscal year, including the auditor's notes. The notes in that report explain that payments to SEIU's local affiliates were treated as chargeable if made as reimbursements for operating expenses, and non-chargeable if made as subsidies for organizing." In response, Plaintiffs state only that: "The first sentence is Admitted. The second sentence is Qualified, as those notes speak for themselves." (Plaintiff's MSEA Response SMF (Docket # 86) at ¶ 18). The Court agrees, and finds that the notes do indeed

claim to the contrary in their Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment (Docket # 68), nor do they make any citation to the Summary Judgment record regarding any alleged inadequacy of the SEIU audit or financial statement. Defendants have demonstrated that Plaintiffs' objection may stem from confusion over a leading in the SEIU report that was initially entitled "Organizing campaign support," but was later corrected to read "Campaign Support and Field Operations." Even viewing the record in the light most favorable to Plaintiffs, there is simply no evidence before the Court that the service fees, as they now stand, are in any way subsidizing organizing activity at the MSEA or SEIU level.

d. Extra-Unit Litigation Costs May Be Included in the Service Fees

Plaintiffs also contend that the service fee improperly includes the cost of "extra-unit litigation," specifically the MSEA's contribution to costs incurred by the SEIU in litigating actions outside the State of Maine. The Court does not find any constitutional problem with the decision to include the SEIU's extra-unit litigation in the service fee. Plaintiffs disingenuously cite to *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), and specifically to paragraph IV-B, to support their statement that "the Supreme Court in *Lehnert* found [extra-unit litigation] to be completely nonchargeable." (Pls.' Mot. for Summ. J. (Docket # 67) at 27.) Plaintiffs' quotation relies on a portion of Justice Blackmun's opinion that was joined only by Chief

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clearly lay out the SEIU's categorization of chargeable and nonchargeable expenses.

Justice Rehnquist and Justices White and Stevens. *Lehnert*, 500 U.S. at 507, 510, 111 S.Ct. 1950. Thus, this portion of *Lehnert* does not state a majority opinion that is binding on this Court. Those circuit courts that have ruled on the issue have found [147] that it is constitutionally permissible for unions to include extra-unit litigation expenses in the service fees charged to nonmembers. *See Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir.1995) (affirming the dissolution of an injunction where nonmembers benefited from being charged for extra-unit litigation and were therefore unlikely to succeed on their claim); *Otto v. Pennsylvania State Educ. Association-NEA*, 330 F.3d 125, 138 (3rd Cir.2003) (upholding extra-unit litigation expenses by applying *Lehnert*'s three-part chargeability test). Following these appeals court rulings, this Court similarly holds as a matter of law that the inclusion of the cost of extra-litigation does not violate Plaintiffs' constitutional rights.

e. No Advance Reduction in Fees is Constitutionally Required

Plaintiff also persists in its claim that the MSEA, by failing to initially categorize organizing expenses as non-chargeable, unconstitutionally failed to calculate an advance reduction in the service fee. As the Court has already discussed, *Hudson* does not require unions to make a good-faith effort to determine the correct proportionate share in advance, but rather to give adequate notice that will provide the nonmember enough information to decide whether to object. Moreover, under *Hudson* the use of an impartial arbitrator and the escrowing of objectors' fees pending resolution of the complaint is sufficient

to safeguard the nonmembers' constitutional rights.[5] Here, the MSEA has placed all objecting nonmember service fees in an escrow account pending the ruling from the impartial arbitrator, as required under the CBA and the July Notice. There is therefore no constitutional violation under *Hudson*.

f. The MSEA Process Allowing Nonmembers to Challenge Service Fees is Constitutional

The MSEA also established constitutionally permissible methods for allowing Nonmembers to object to the amount of the service fee. In *Hudson*, the Court found that the local union's method of allowing challenges to the fee was insufficient to protect employees' First Amendment rights against compelled speech and association. *Id.* at 310, 106 S.Ct. 1066.

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[5] As explained in the Court's Order on Motion for Preliminary Injunction:

> The Court notes that several Circuits, including the Second, Third, Fourth, Ninth, and Eleventh have held that an escrow of service fees that complies with *Hudson*'s requirements adequately protects nonmembers' First Amendment rights. *See Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1374 (9th Cir.1993); *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir.1990), cert. dismissed, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991); *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir.1989); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), cert. denied, 493 U.S. 848, 110 S.Ct. 144, 107 L.Ed.2d 102 (1989); *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2d Cir.1987). Indeed, these holdings seem to best comport with the Supreme Court's suggestion in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* that "advance reduction of dues and/or interest-bearing escrow accounts" would protect nonmembers from any First Amendment violations. 466 U.S. 435, 444, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) (emphasis added).

Locke, 382 F.Supp.2d at 191.

There, the service fees were automatically deducted from nonmembers' paychecks, and employees could object to the fees only within thirty days of that first deduction. *Id.* at 296, 106 S.Ct. 1066. The objections would not be considered by an impartial party, but rather by the union's Executive Committee, then the union's Executive Board, and finally by an arbitrator selected by the union's president. *Id.* A prevailing objector would receive a rebate **[148]** of any wrongfully-deducted fees, and future fees would be reduced to the newly-established amount for all other Non-members. *Id.*

The method employed by the MSEA for considering such objections does not raise these constitutional considerations. As provided for in the CBA, Non-members who challenge the service fee will have their payments placed in an interest-bearing escrow account while the dispute is heard before an independent arbitrator following the American Arbitration Association's Rules for Impartial Determination of Union Fees. (*See* CBA (Docket # 71, Ex. 2) at 58.) Should the State discover that an employee has failed either to pay or challenge the service fee, the employee will receive a thirty-day period in which they must pay the fee, with arrears. (*Id.*) An employee who fails to do so will be given a notice of proposed dismissal and will be entitled to meet with the appointing authority, and be heard, before being dismissed. (*Id.*) These requirements ensure that the standards laid out in *Hudson*, namely that challenged nonmember fees be places in escrow and that the arbitration process be independent from the union, are met. *Hudson*, 475 U.S. at 308, 106 S.Ct. 1066.

Having considered Plaintiffs' multiple claims that the service fee and the notice and process for challenging the service fee are constitutionally inadequate, the Court concludes that these claims are without merit. Thus, the Court finds Defendants are entitled to summary judgment on Plaintiffs' 42 U.S.C. § 1983 claim.

B. Indemnification Provision

Plaintiffs also seek to void the indemnification clause in the CBA, claiming it violates public policy, as it causes the State to "ignore consideration of whether the collection of agency fees violates the constitutional rights of nonunion State employees." (Pls.' First Am. Compl. (Docket # 47) at ¶ 47.) The entirety of their argument rests on the premise that the MSEA could indemnify the State for deprivations of Nonmembers' federal constitutional rights. To that end, Plaintiffs quote the original indemnification provision from the CBA, and ignore the October 18, 2005 revision to the CBA that provides that "nothing herein shall require Indemnification for any intentional deprivation of an individual's constitutional rights by the State." (2005-2007 Agreement Between the State of Maine and the MSEA-SEIU (Docket # 66, Ex. A) at 2.) Plaintiffs later state in their Consolidated Reply to Defendants' Oppositions to Plaintiffs' Motion for Summary Judgment that they do not address this portion of the modification provision because it is "not material." (Pls.' Consol. Reply to Defs.' Opp'n to Pls.' Mot. for Summ. J. (Docket # 88) at 18.) The Court disagrees, and, as Plaintiffs have provided no reason not to do so, considers only the indemnification clause that is currently in effect.

1. Standing

Before reaching the merits of the arguments, the Court must determine whether Plaintiffs have standing to challenge the indemnification clause. In order to meet the minimal constitutional requirements for standing, the Plaintiffs must meet three criteria: (1) they must demonstrate an injury in fact, which is "concrete, distinct and palpable, and actual or imminent"; (2) they must establish a causal connection between the injury and the defendant; and (3) they must demonstrate "substantial likelihood that the requested relief will remedy the alleged injury in fact." *McConnell v. Federal Election Com'n*, 540 U.S. 93, 225, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (internal citations omitted). There are no First Circuit cases specific to standing in a similar indemnification **[149]** claim, so the Court must look elsewhere for guidance. In *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir.2002), *cert. denied*, 537 U.S. 1188, 123 S.Ct. 1251, 154 L.Ed.2d 1019 (2003), the Ninth Circuit addressed a fact pattern similar to the one before the Court.[6] There, the court found no causal relationship between the indemnification clause and Plaintiffs' purported injuries. In *Prescott*, as here, the plaintiffs' only cognizable injury was that "the union did not give them adequate notice of the basis of the fees." *Id.* at 845. The court also found little link between the indemnification clause and the

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[6] Plaintiffs' argument that the Court should ignore *Prescott* because the Ninth Circuit has been regularly overturned by the Supreme Court (Resp. in Opp'n to MSEA Defs.' Mot. for Summ. J. (Docket # 84) at 27-28) is extraordinarily unpersuasive, in particular because Plaintiffs do not provide any analysis specific to *Prescott* itself. The Supreme Court saw fit to let stand the Ninth Circuit's holding in *Prescott*, and this Court therefore sees no reason to dismiss the analysis in *Prescott* out of hand.

State's willingness to terminate the nonmember for failure to pay. The *Prescott* court concluded that "the challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice." *Id.* at 846. The Court finds much of this analysis persuasive, particularly in a case such as this, where Plaintiffs did not receive inadequate notice or otherwise suffer injury.

The question is made difficult by Plaintiffs, who spend little time addressing this argument, finding it an "invitation into irrationality" (Pls.' Mot. for Summ. J. (Docket # 67) at 15) and "absurd" (Resp. in Opp'n to MSEA Defs.' Mot. for Summ. J. (Docket # 84) at 67). They argue that they suffered injury simply because the State agreed to enforce a "forced-unionism provision" (*Id.* at 29) and further suffered injury when they were told that Nonmembers would face termination should they refuse to pay the fee (Pls.' Mot. for Summ. J. (Docket # 67) at 16). As discussed earlier in this Order, it is constitutional for unions to collect service fees, and it is constitutional for the State to enforce such a collection, provided the safeguards in *Hudson* are met. These are therefore not "injuries" suffered by the Plaintiff. Plaintiff raises only one other potential injury: the possibility that the State might enforce the service fee requirement in the absence of the *Hudson* safeguards. (Resp. in Opp'n to MSEA Defs.' Mot. for Summ. J. (Docket # 84) at 30.) Plaintiffs cite four cases to support their premise, and reading generously into their argumentation, contend that because the opinions reached the merits of the issue the courts must have found standing. *See Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir.2002); *Hohe v. Casey*, 956 F.2d 399 (3rd Cir.1992); *Weaver v.*

University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992); *Stamford Bd. of Educ. v. Stamford Educ. Ass'n* 697 F.2d 70 (2nd Cir.1982).

Only one of these cases addressed standing, although the question was not before it, finding that an injury (and therefore standing) existed because "the nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the nonmembers' paychecks." *Wessel*, 299 F.3d at 1199. Plaintiffs give no argument as to why they would have standing on this point, despite the fact that they suffered no injury under *Hudson*[7], nor do they offer **[150]** any arguments as to how voiding the indemnification provision would prevent such an injury in the future. In short, the Court has grave misgivings as to whether Plaintiffs have standing to challenge the indemnification provision. Nonetheless, in the absence of guidance from the First Circuit, the Court will assume that Plaintiffs have standing in order to reach the merits of the parties' arguments.

2. Public Policy Considerations

Although there is no First Circuit authority to guide the Court in its consideration of the indemnification provision on the merits, there is authority from other circuits-albeit mixed. One circuit has struck down such provisions when they allow indemnification for intentional deprivation of

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[7] Plaintiffs also appear to argue that the service fee, which they refer to throughout as "forced unionism," is itself an injury that the indemnification clause enables and encourages. The constitutionality of service fees themselves, however, is not before the Court.

constitutional rights, two have struck down such provisions when they are silent as to indemnification for intentional deprivation of rights, and one has upheld such silent provisions. None have involved situations, such as here, where the indemnification provision explicitly excluded coverage for intentional deprivation of constitutional rights.

The indemnification provision in this case can clearly be distinguished from the Second Circuit's decision in *Stamford*, which struck down an indemnification provision that was used to indemnify an employer for intentional discrimination. There, the Second Circuit found indemnification provisions to be void as against public policy only when they allow indemnification for the public employer's intentional deprivation of the employee's constitutional rights. In *Stamford*, the indemnification provision at issue protected an agreement between the school board and the union that explicitly contained separate and discriminatory pay scales for male and female sports coaches. *Stamford*, 697 F.2d at 71. The court's concern was intentional discrimination, and particularly that a public employer "will have little reason to be concerned over whether labor agreements discriminate against women" knowing that they will be indemnified. *Id.* at 73. *See also Gibbs-Alfano v. Burton*, 281 F.3d 12, 22 (2nd Cir. 2002) (limiting the *Stamford* holding to cases of discriminatory conduct). This is not a concern here, where the indemnification provision specifically prohibits indemnification for the State's "intentional deprivation of an individual's constitutional rights."

The indemnification at issue here can also be distinguished from those considered by the Tenth Circuit (in *Wessel*), the Sixth Circuit (in *Weaver*), and

the Third Circuit (in *Hohe*). In a split decision striking down the indemnification provision, the Tenth Circuit found that both the employer and the union have a burden to carry out the *Hudson* requirements, and that both parties must have "ample incentive to put proper procedures in place." *Wessel*, 299 F.3d at 1198. In the most stringent critique of indemnification provisions, the Sixth Circuit, in finding that an employer has unique duties under *Hudson*, struck down the indemnification provision after finding that it allowed the employer to follow the union's procedures, despite the fact that they might fail to comply with the *Hudson* standards. *See Weaver*, 970 F.2d at 1538. It found that "a clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy." *Id.* Finally, in *Hohe*, the Third Circuit upheld the indemnification provision, finding that even with indemnification a Nonmember whose rights had been violated under *Hudson* would still be able to collect costs and fees from the State. The Third Circuit made this finding despite the fact that the indemnification clause did not prohibit indemnification **[151]** for intentional constitutional violations. *Hohe*, 956 F.2d at 411.

Unlike the public employer in all of the above cases, it is clear that the State of Maine is not lacking in incentive to ensure that the *Hudson* requirements are met, and it is also clear that the indemnification provision would not insulate the State from the consequences of failing to carry out its duties. The Court is assured that the indemnification provision in this case, which carries a strong incentive for the State to ensure that it does not commit any

intentional deprivations of Nonmembers' constitutional rights, is sufficient to safeguard against the harms pondered by the *Weaver* and *Wessel* courts.

Having considered the available precedent and the specific indemnification provision at issue here, the Court cannot conclude that the indemnification provision is void against public policy. In the cases cited above, the public employer was eligible for indemnification even for intentional violation of Nonmembers' constitutional rights. Here, the State has an incentive to ensure that it takes no action to violate the constitutional rights of Nonmembers, as such intentional actions would not be eligible for indemnification. Moreover, the MSEA undoubtedly has a strong incentive to protect the constitutional rights of Nonmembers, as failure to do so would lead to costly legal battles, and Nonmembers whose rights are violated would still be able to bring action and recover against the MSEA for those violations. In short, the State is not indemnified for its own unconstitutional actions, including the termination of an employee who has refused to pay a service fee that fails to comply with *Hudson*'s requirements.

IV. CONCLUSION

For these reasons, Plaintiffs' Motion for Leave (Docket # 89) is hereby GRANTED, Plaintiffs' Motion for Summary Judgment (Docket # 67) and Plaintiffs' Motion for Oral Argument/Hearing (Docket # 74) are hereby DENIED, and Defendants' Motions for Summary Judgment (Dockets # 64 & 73) are hereby GRANTED. Plaintiffs' Renewed Motion for Class Certification (Docket # 55) is therefore MOOT.

SO ORDERED.

APPENDIX C

UNITED STATES CONSTITUTION

First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

UNITED STATES CONSTITUTION

Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OPPOSITION BRIEF

(3)

No. 07-610

FILED

JAN 9 2008

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SUPREME COURT

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IN THE

Supreme Court of the United States

DANIEL B. LOCKE, *et al.*, on behalf of themselves and the class they seek to represent,

Petitioners,

v.

EDWARD A. KARASS, State Controller; REBECCA M. WYKE, Commissioner, Department of Administrative and Financial Services; KENNETH A. WALO, Director, Bureau of Employment Relations; and MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did a public sector union violate the First Amendment by treating as chargeable in calculating its agency fee expenditures from pooled resources on "extra-unit litigation" concededly germane to collective bargaining, where those expenditures accounted for less than 2% of the agency fee and the complaining nonmember feepayers were required to pay only half of the fee?

CORPORATE DISCLOSURE STATEMENT

Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union is organized as a nonprofit corporation. It has no parent corporation, nor does any publicly held company own any stock in it.

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IN THE

Supreme Court of the United States

No. 07-610

DANIEL B. LOCKE, *et al.*, on behalf of themselves and the class they seek to represent,

Petitioners,

v.

EDWARD A. KARASS, State Controller; REBECCA M. WYKE, Commissioner, Department of Administrative and Financial Services; KENNETH A. WALO, Director, Bureau of Employment Relations; and MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union ("MSEA") respectfully urges the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The sole question presented by the *certiorari* petition—concerning the legality of treating a union's

expenses on "extra-unit litigation" germane to collective bargaining as chargeable in computing the agency fee to be paid to the union by nonmember employees the union represents—arises here in the following *sui generis* setting.

A. Respondent Maine State Employees Association ("MSEA"), an affiliate of the Service Employees International Union ("SEIU"), is the designated exclusive bargaining representative of employees in four bargaining units within the State's executive branch.[1] Petitioners are employees in those bargaining units who have chosen not to become dues-paying members of MSEA. Pet. App. 3a.

As permitted by law, the collective bargaining agreements between MSEA and the State provide as a general matter that all nonmember employees covered by the agreements are to pay MSEA a "service fee" (also known as a "fair share" or "agency" fee), in an amount less than full union dues, based on the nonmember's pro rata share of MSEA's expenditures "related to its services as the exclusive bargaining agreement," and excluding "those MSEA expenditures that are not related to bargaining and contract administration," Pet. App. 4a—*i.e.*, a service fee equal in amount to the fee that can, consistent with the Constitution, be charged to nonmember employees who have made known their objection to paying a fee equal to full union dues. *See generally Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991) (establish-

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[1] The reference in the caption to "Maine State Employees Association, SEIU Local 1989, Service Employees International Union" is solely to MSEA; there is no other union respondent.

ing standards for determining which union expenditures are chargeable to objecting nonmembers).[2]

Moreover, the collective bargaining agreements in force for the entire period at issue in this litigation provided that nonmember employees who had been hired prior to July 2, 2003—including all of the Petitioners—were to pay only 50 percent of the reduced service fee as so determined. Pet. App. 47a, 4a n.6.

MSEA and other affiliates receive services and assistance from SEIU, and in return they pay an affiliation fee to SEIU. Pet. App. 5a, 36a. The activities for which MSEA incurs expenses include litigation; and the services provided to MSEA and other state and local affiliates by SEIU include conducting litigation for and on behalf of the affiliates. Pet. App. 5a. In determining the service fee to be paid by nonmembers, MSEA treated as chargeable the litigation conducted by MSEA and the litigation conducted by SEIU on behalf of SEIU's affiliates, if

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[2] Although as a matter of First Amendment law a union may set its agency fee for nonmember employees who are not "objectors" at an amount equal to full union dues, MSEA sets its agency fee for all nonmember employees, whether the employee is an objector or not, at the reduced amount legally chargeable to objectors. Pet. App. 3a-4a, 46a. Petitioners' assertion that, absent an objection, MSEA requires a nonmember to pay an amount equal to full dues, including "that portion of union dues identified in [MSEA's] notice as 'nonchargeable,'" Pet. 4, is incorrect: the MSEA "objection" process to which Petitioners refer is *not* one that a nonmember must pursue in order to pay the reduced service fee rather than a fee equal to full dues; it is a process by which a nonmember who is required to pay the reduced amount of the service fee may challenge MSEA's determination of the amount of the reduced fee. Pet. App. 6a, 53a, 55a.

the litigation "was germane to collective bargaining," *id.*, whether or not it had been "undertaken specifically for [an MSEA feepayer's] own bargaining unit," *id.* In contrast, "[c]osts of litigation that was not related to collective bargaining" were treated as nonchargeable and thus "were not included in the service fees assessed to MSEA's nonmembers." *Id.*

During the period at issue in this case, the service fee charged by MSEA to all nonmembers hired after July 2, 2003 was set at 49.13% of full union dues. Pet. App. 6a, 37a. Petitioners, as pre-July 2003 hires, were charged only half of that fee—that is to say, 24.57% of full union dues. The biweekly dues amount was $18.20, so the biweekly amount of the service fee for post-2003 hires was set at $8.94, and the biweekly amount for the Petitioners was $4.47. Pet. App. 37a.

During this period, approximately 1.67% of the service fee charged by MSEA to post-July 2003 hires was attributable to expenses for litigation outside Petitioners' bargaining units. *Id.* Consequently, treating those expenses as nonchargeable would have reduced MSEA's service fee from $8.94 to approximately $8.79 biweekly—still an amount much higher than the $4.47 biweekly fee that was charged to the Petitioners.

B. Petitioners sued MSEA in June 2005, raising a number of claims, of which the only one still at issue is Petitioners' contention that MSEA improperly charged nonmember feepayers for "extra-unit litigation."[3] Petitioners did not dispute MSEA's repre-

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[3] Petitioners sought to represent a class, but upon entering summary judgment for MSEA on the merits, the district court denied the motion for class certification as moot, Pet. App. 67a,

sentation that the only litigation expenses that had been included in determining the service fee were expenses for litigation "germane to collective bargaining." Pet. App. 5a, 30a.[4] Indeed, Petitioners did not even identify or describe any "extra-unit" litigation in which MSEA or SEIU had engaged and which had been treated as chargeable by MSEA, much less attempt to demonstrate that any such litigation had not been germane to collective bargaining. Rather, Petitioners' position was that *no* "extra-unit" litigation expenses, no matter how germane to collective bargaining, can properly be treated as chargeable in determining the service fee a nonmember in a particular bargaining unit may be required to pay and that only litigation undertaken specifically for the nonmember's own bargaining unit is chargeable.

The district court rejected Petitioners' "extra-unit litigation" contention, Pet. App. 58a, and the First Circuit affirmed. The Court of Appeals explained that in *Lehnert*, this Court rejected the argument that objecting nonmembers "may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit," and held that the fee charged to nonmembers may include "their pro rata share of the costs associated with otherwise chargeable activities of [the local unit's] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting

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and the Court of Appeals did not reach the issue. Pet. App. 7a, n.8.

[4] *See also* Pet. App. 32a (noting that Petitioners "did not dispute whether the litigation charges were 'germane,' as that term was defined in *Lehnert*").

employees' bargaining unit." Pet. App. 17a-18a (quoting *Lehnert*, 500 U.S. at 522, 524).[5]

The Court of Appeals rejected Petitioners' contention that "extra-unit litigation" expenses germane to collective bargaining should be categorically excluded from *Lehnert*'s holding as to extra-unit expenses germane to collective bargaining generally. Observing that "litigation is not susceptible to a single label," Pet App. 30a, the court below stated:

> Some litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities. However, other litigation may be central to the negotiation and administration of a collective bargaining agreement. In this case, the [Petitioners] have not challenged MSEA's characterization of the litigation for which the nonmembers were charged as "related" to collective bargaining. [Pet. App. 30a-31a.]

And the Court of Appeals added that Petitioners "have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy th[e] test [for chargeability articulated in *Lehnert*]." Pet. App. 31a.

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[5] *Lehnert* explains that an "otherwise chargeable" activity is one that is "1). . . 'germane' to collective bargaining activity; (2) is justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) [does] not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." Pet. App. 17a. As the Court of Appeals noted, "[Petitioners] have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy this test." Pet. App. 31a.

Recognizing that Justice Blackmun's opinion in *Lehnert* would have treated "extra-unit litigation" as an exception to this Court's holding as to extra-unit expenses generally, the Court of Appeals pointed out that Justice Blackmun's view did not command a majority of the Court. Pet. App. 18a-21a, 30a. And the court below noted that *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), on which Petitioners relied, dealt only with litigation "not involving the negotiation of agreements or settlement of grievances," Pet. App. 28a (quoting *Ellis*, 466 U.S. at 440), and did not address a union-resource-pooling arrangement for paying for litigation expenses such as was at issue in *Lehnert* and this case, *see* Pet. App. 29a-30a.

Concurring Judge Lynch stated that "[t]he First Amendment is not violated by allowing extra-unit litigation expenses to be charged according to the same criteria of chargeability as other extra-unit expenses," Pet. App. 38a, because such litigation expenses are "analytically identical" to other expenses insofar as *Lehnert*'s resource-pooling principle is concerned. *Id.* (quoting *International Ass'n. of Machinists v. NLRB*, 133 F.3d 1012, 1016 (7th Cir.) (Posner, J.), *cert. denied*, 525 U.S. 813 (1998)).

ARGUMENT

Over the past dozen years, four Courts of Appeals (the First, Third, Sixth and Seventh Circuits) have considered whether a union's expenses on "extra-unit litigation" germane to collective bargaining and paid out of pooled union resources are chargeable to non-member agency feepayers. All four have concluded in full and carefully reasoned decisions that, under this Court's *Lehnert* decision, the answer is yes: just as expenses for extra-unit *negotiation* of collective bargaining agreements are chargeable under *Lehnert's*

union-resource-pooling principle, so are expenses for extra-unit *enforcement* of such agreements and for other litigation germane to collective bargaining. *See* Pet. App. at 1a-41a; *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125 (3d Cir.) (First Amendment), *cert. denied*, 540 U.S. 982 (2003); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir.) (National Labor Relations Act), *cert. denied*, 525 U.S. 813 (1998); *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995) (First Amendment), *cert. denied*, 519 U.S. 964 (1996). The National Labor Relations Board has reached the same conclusion, in the decision that was enforced by the Seventh Circuit in the *Machinists* case. *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995).

These four Court of Appeals decisions are sound in principle and in their reading of the multiple opinions in *Lehnert*, as well as in their recognition that the question presented here was not presented or decided in *Ellis*. And the unanimity in the Courts of Appeals over the last dozen years shows that Petitioners' claim of a live conflict in the lower courts that warrants this Court's attention—which is based on two earlier and largely conclusory state court decisions and an earlier Tenth Circuit decision that erroneously treats *Ellis* as the controlling precedent—rings hollow.

A. *Lehnert* holds as a general rule that, where a local union is affiliated with a state and/or national parent union that makes services generally available to affiliates as needed, expenses on activities germane to collective bargaining that are incurred by the parent union and paid for out of pooled resources are chargeable to nonmember agency feepayers "even if those activities were not performed for the direct

benefit of the [feepayer's] bargaining unit." *Lehnert*, 500 U.S. at 524. That is so, this Court explained, because "that part of a local's affiliation fee [to the parent union] which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." *Id.* at 523. See also *id.* at 562 (opinion of Scalia, J.) ("It is a tangible benefit . . . to have . . . services on call, even in the years they are not used."); *id.* at 563 (opinion of Kennedy, J.) ("we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid . . . legal services plan").

Lehnert thus establishes that, as a rule, there is no "extra-unit" limitation on chargeability. For example, if a parent union assists an affiliate by providing experts to negotiate a legally enforceable collective bargaining agreement for that affiliate, the expenses thus incurred may be included on a pro rata basis in the agency fee that is charged to feepayers in all affiliated units, because the availability of such negotiating assistance is a "protection," *Lehnert*, 500 U.S. at 523 (opinion of the Court) and a "tangible benefit," *id.* at 562 (opinion of Scalia, J.), for all units.

Petitioners do not dispute that proposition, and yet their submission is that a parent union that assists an affiliate by providing attorneys to *enforce* such a collective bargaining agreement in arbitration or in agency or court proceedings cannot include the costs thus incurred in the agency fees that are charged by its affiliates, even though the costs incurred by the parent union *in negotiating that same agreement* could be charged on that basis. The Court of Appeals

in this case rejected Petitioners' argument, reasoning that there is no principled basis for excluding extra-unit litigation from *Lehnert's* core holding that a parent union's expenses incurred in providing an otherwise chargeable service that is available to all affiliated units as needed can properly be charged to feepayers in all units, "even if it is not actually expended on [a particular fee payer's] unit in any particular membership year." *Lehnert,* 500 U.S. at 523. *See* Pet. App. 27a-32a.

The First Circuit's conclusion and analysis is in complete accord with the conclusions and analysis of the three other Courts of Appeals that have considered this issue over the past dozen years, as well as with the views of the National Labor Relations Board. *See cases cited supra* at 8. Over this period, it has been the unanimous view that there is "no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses," *Otto, supra*, 330 F.3d at 139, because litigation expenses are "analytically identical," *Machinists, supra*, 133 F.3d at 1016 (Posner, J.), to other expenses as respects the appropriateness *vel non* of allowing expenses that are germane to bargaining and are made from pooled resources to be charged to feepayers in all units that have access to those resources. *See also California Saw & Knife Works*, 320 N.L.R.B. at 239 (holding that the NLRB will "apply the same standard for determining the chargeability of [extra-unit] litigation expenses as we are required . . . to apply to all other expenses"); *Reese,* 71 F.3d at 623 (holding that *Lehnert's* reasoning on the chargeability of pooled expenses applies to germane-to-bargaining litigation as to other kinds of germane activities).

B. In holding that "extra-unit litigation" expenses germane to collective bargaining do not constitute an exception to *Lehnert's* teaching as to the chargeability of extra-unit expenses germane to collective bargaining generally, all four of the recent Court of Appeals decisions have rejected the contention, pressed here by Petitioners, that Justice Blackmun's discussion of this subject in *Lehnert* should be taken as controlling.

In the first place, as the First Circuit correctly observed, "Justice Blackmun's treatment of extra-unit litigation costs in *Lehnert* did not command a majority of the Court." Pet. App. 30a. And Petitioners' repeated suggestion that Justice Scalia's separate opinion in *Lehnert* supports Justice Blackmun's position, Pet. i, 9, 12, 14, 16, is incorrect. As the Third Circuit pointed out in *Otto*, Justice Kennedy, who joined in Justice Scalia's opinion, specifically explained that a categorical rule against the chargeability of extra-unit litigation would be inconsistent with Justice Scalia's analysis. *See Otto*, 330 F.3d at 137, citing *Lehnert*, 500 U.S. at 563 (opinion of Kennedy, J.) ("remov[ing] litigation . . . from . . . the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions . . . makes little sense if we acknowledge, as Justice Scalia articulates . . . , that we permit charges for affiliate expenditures because expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but not contractual consulting or legal services plan.")[6]

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[6] Petitioners miss the point of Justice Scalia's reference to *Ellis*. *See* Pet. 16. Justice Scalia did not describe *Ellis* as having treated litigation as categorically different from other kinds of

Furthermore, all of the recent Court of Appeals decisions have agreed that the analysis in Justice Blackmun's *Lehnert* plurality opinion is unpersuasive on this issue and is inconsistent with *Lehnert's* core holding. In particular, Justice Blackmun declared that litigation should be subject to a special rule because it "may cover a wide range of areas," and may be "akin to lobbying" and of a "political and expressive nature." *Lehnert*, 500 U.S. at 528 (opinion of Blackmun, J.). But, as the First Circuit pointed out, this simply means that some union litigation—but by no means all—will fail to satisfy *Lehnert's* chargeability standard even with respect to the particular bargaining unit that is involved in the litigation. Pet. App. 30a-31a. It does *not* mean that *germane-to-bargaining* "extra-unit" litigation that *does* satisfy *Lehnert's* test must nevertheless be excluded from *Lehnert's* core holding as to the chargeability of germane-to-bargaining activities that are funded out of pooled resources. *Id.*[7] *See California Saw & Knife Works*, 320 N.L.R.B. at 238 ("The kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors . . . would not be the kinds of lawsuits that are 'akin to lobbying;'"); *Otto*, 330 F.3d at 139 ("[Where] extra-unit litigation expenditures. . .

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activities; rather, Justice Scalia viewed *Ellis* as supporting a rule that only activities that a union is legally required to conduct—be they litigation or anything else—are chargeable. *See Lehnert*, 500 U.S. at 554-55 (opinion of Scalia, J.). As Justice Kennedy correctly observed, under that approach extra-unit litigation expenses would *not* be categorically non-chargeable.

[7] As noted, Petitioners have not disputed that the litigation that was treated as chargeable by MSEA satisfied the three-pronged standard articulated by this Court in *Lehnert*. *See supra note* 5.

ensure the availability of resources for collective-bargaining-related litigation, those expenditures are germane to collective-bargaining activity . . . . [W]e discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses").[8]

C. Petitioners' contention that the question presented here was decided in *Ellis* misreads that decision, as the decision below and the other recent Court of Appeals decisions have recognized.

It is telling that the *Ellis* Court's holding as to extra-unit litigation was a matter of statutory construction of one particular labor act (the Railway Labor Act), not a more general holding,[9] and that *Ellis* addressed only "litigation not involving the negotiation of agreements or settlement of griev-

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[8] A rule treating extra-unit litigation as categorically nonchargeable without regard to its subject matter—and particularly without regard to its relationship to collective bargaining—would be inconsistent with this Court's recognition of the need for a "a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees." *Lehnert*, 500 U.S. at 519. This rule has been applied to categories of activities that arguably are more purely expressive than litigation. For example, this Court held in *Lehnert* that the expenses incurred in publishing a statewide union publication (the "Teacher's Voice") were chargeable to the extent that the publication discussed activities related to collective bargaining, whether or not the activities occurred in a feepayer's own unit. *Id.* at 527.

[9] *See Ellis*, 466 U.S. at 445 (inquiring "whether *the statute* permits the union to charge [objecting nonmembers] for any of the challenged expenditures" (emphasis added); *id.* at 455 (addressing First Amendment issues "only . . . with regard to the three activities [, *not* including extra-unit litigation,] for which, we have held, the [statute] allows the union to use [objectors'] contributions").

ances." *Ellis,* 466 U.S. at 440.[10] Beyond that, the First Circuit was correct in concluding that *Ellis* is not on point for cases like this one because "the *Ellis* court was not confronted with a pooling arrangement . . . ; its decision pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time." Pet. App. 27a-28a. In contrast, "*Lehnert* addressed a different factual context—a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*." Pet. App. 29a. See also *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.) ("*Ellis* . . . contains no discussion of whether a local bargaining unit might choose to fund litigation. . . through a cost sharing arrangement under the auspices of the affiliate"); *Otto*, 330 F.3d at 136 ("*Ellis* did not involve expenses incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement with that affiliate . . . . This presents a significantly different question than *Ellis*.")

D. In the face of this series of recent, consistent, thoughtful and fully reasoned Court of Appeals decisions explaining why *Lehnert's* holding on the chargeability of extra-unit expenses that are germane to collective bargaining does not admit of an "extra-unit

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[10] The extra-unit litigation that was found not to be chargeable in Ellis included "the union's challenge to the legality of the airline industry mutual aid pact; . . . litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or . . . defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964." *Id.* at 453.

litigation" exception, Petitioners seek to fashion a conflict out of three earlier decisions, two by state courts and one by the Tenth Circuit, none of which deals squarely with this Court's core holding in *Lehnert* and none of which has been found persuasive in any subsequent case.

Both of the state court decisions on which Petitioners rely do little more than to declare that Justice Blackmun's discussion of extra-unit litigation is "persuasive," *see Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992), and to mischaracterize the opinions of the other Members of the Court in *Lehnert*. *See Albro*, 585 N.E.2d at 673 (claiming to rely on "the judgment of the Court in *Lehnert*" regarding extra-unit litigation); *Browne*, 485 N.W.2d at 388 ("infer[ring] from Justice Scalia's discussion of *Ellis*" that extra-unit litigation expenses are nonchargeable under Justice Scalia's analysis, without even noting Justice Kennedy's explanation as to why Justice Scalia's analysis does *not* lead to that result).

In its turn, the earlier Tenth Circuit decision that Petitioners invoke mistakenly treated *Ellis* as the controlling authority in the context of a union-resource-pooling arrangement. *See Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1126-31 (10th Cir. 1991).[11]

Given those failings, none of these earlier decisions—each of which issued within a year of *Lehnert*

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[11] The Tenth Circuit also mistook the import of Justice Scalia's separate opinion, ignoring Justice Kennedy's statement in *Lehnert* on that precise point. *Id.* at 1130 n.4.

and each of which failed to come to grips with the underlying logic of *Lehnert's* union-resource-pooling principle and failed to articulate any reason why extra-unit litigation germane to collective bargaining should categorically be excluded from its application—has proved to have any current purchase.[12]

That being so, and with the fatal flaws in Petitioners' position now having been exhaustively demonstrated by four consecutive Court of Appeals decisions, the maturation of the law in the lower courts on the issue Petitioners seek to raise belies Petitioners' claim of a live conflict in the lower courts.

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[12] Petitioners state that the Indiana Court of Appeals "follow[ed]" its 1992 *Albro* decision in *Byrd v. AFSCME Council 62*, 781 N.E.2d 713, 722 (Ind. Ct. App. 2003). *See* Pet. 22. However, the question presented in *Byrd* was simply whether a state executive order was facially unconstitutional because it might be read to allow a union to charge nonmembers for all expenses other than "political contributions." 781 N.E.2d at 722. In holding that that was a misreading of the order, *id.* at 724, the Court did not adjudicate any challenges to particular types of expenditures.

Petitioners also make much of two Court of Appeals decisions *in which no issue of extra-unit litigation was presented.* The First Circuit's own earlier decision in *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000), discussed in the Petition at 21-22, involved bar dues, not union fees, and the challenged expenditures were for life insurance, not litigation. In *Crawford v. Airline Pilots Ass'n*, 992 F.2d 1295 (4th Cir. 1993), the majority held that no question of extra-unit litigation was presented. Plaintiffs' reliance on the *dissent* in *Crawford*, *see* Pet. 19-20, thus is beside the point; and in any event, that dissent is based on obvious misreadings of *Ellis* and *Lehnert*. See *Crawford*, 992 F.2d at 1313 1316 (Russell, J., dissenting) (mistakenly treating Justice Blackmun's discussion as the opinion of the Court).

E. We would be derelict if we did not add that in any event this case would present a poor vehicle in which to consider the question Petitioners raise in their *certiorari* petition.

In the first place, this is not a case in which the Petitioner agency feepayers were required to pay for extra-unit litigation expenses. During the entire period at issue in this suit—and the entire period as to which the record contains any evidence showing the fees that were charged by MSEA and the basis on which the amounts were determined—Petitioners were required to pay only half of the amount that MSEA had determined to be legally chargeable, and "extra-unit litigation" expenses comprised only a minuscule portion of the fee, thus falling well within the 50% cushion. *See supra* at 4. The amount Petitioners paid thus did not exceed, or even approach, the amount that would be constitutionally chargeable on Petitioners' own theory.

Of equal moment, in keeping with the abstract quality of their claim, Petitioners have never identified or described the litigation that MSEA treated as chargeable and that Petitioners contend was nonchargeable. Indeed, the record does not identify, much less describe, a single piece of litigation in which SEIU or MSEA engaged during the period at issue.[13] Nevertheless, Petitioners' argument against the chargeability of extra-unit litigation, such as it is,

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[13] Petitioners have not contended that MSEA had any obligation to specify the particular litigation it treated as chargeable. *See generally Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) ("The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures," but need only identify "the major categories of expenditures" and provide "an explanation" of how it determined chargeability).

is predicated on the notion that such litigation is "akin to lobbying" and of a highly "political and expressive nature." Pet 13-14 (quoting *Lehnert*, 500 U.S. at 528) (opinion of Blackmun, J.) Yet Petitioners acknowledge that "union litigation may cover a diverse range of areas," Pet. 14; and the *only* thing that is known from this record about the litigation activities that MSEA treated as chargeable is that the litigation was germane to collective bargaining. Pet. App. 5a, 31a-32a. There is no evidence in the record that could inform consideration of Petitioners' contention that this germane-to-bargaining litigation was somehow "political" or "akin to lobbying" in a way that other germane-to-bargaining activities are not. It makes no sense, we submit, for this Court to entertain a claim that depends entirely on such characterizations on a record that contains no description at all of the litigation activities that Petitioners claim should not be chargeable to them.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 07-610

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DANIEL B. LOCKE ET AL., ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER; REBECCA M. WYKE, COMMISSIONER, DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES; KENNETH A. WALO, DIRECTOR, MAINE BUREAU OF EMPLOYMENT RELATIONS; AND MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

The Brief in Opposition of Respondent Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("Opp.") demonstrates why Circuit Judge Lynch correctly observed that a decision by this Court on the Question Presented would resolve confusion among the lower courts and "provide needed clarity." Pet. App. A. at 41a, *Locke v. Karass*, 498 F.3d 49, 69 (1ST CIR. 2007) (Lynch, J., concurring).

I. The Case Is Not *Sui Generis*.

Respondent improbably asserts that this case is *"sui generis."* Opp. at 2.[1] This assertion begs the Question Presented. Respondent's consistent position has been that the categorical prohibition against charging nonmembers for extra-unit litigation established by *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), was somehow discarded or refined by *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). According to Respondent, *Lehnert* permits extraction of funds for such activities, so long as nonmembers' monies are adequately shuffled among a labor union's affiliates,

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[1] Leaping from the improbable to the simply false, Respondent repeats the First Circuit's error that "[Petitioners] have not, before the district court or on appeal, argued that the particular expenditures for which they were charged failed to satisfy th[e three-part *Lehnert*] test." Opp. at 6 n.5, *citing* Pet. App. A at 31a. The Record belies Respondent's claim. *See* Record in Civil Action No. 2:05-cv-112-GZS, Clerk's Docket No. 67: Mem. at 27; 1st Cir. Case No. 06-1747: Pls-Appellants' Br. at 19-25; Pls-Appellants' Reply Br. at 7-8 n.7.

and those affiliates provide creative rationalizations. Under Respondent's formulation, virtually **every** case would be *sui generis* for unions extracting monies from unwilling employees, and this Court's decisionmaking provides little meaningful guidance.

Respondent's reading of *Lehnert* is not and cannot be the law. Such an outcome would require, *inter alia*, the improbable happenstance that a majority of the *Lehnert* Court rejected *Ellis*' categorical teaching not only *sub silentio*, but while the entire Court — even Justice Marshall, the only Justice who clearly would have supported the decision below[2] — recognized the import of, and pledged fidelity to, *Ellis*!

Whether or not the First Circuit properly applied this Court's teachings, this Court should exercise its supervisory power to resolve the manifest confusion on this issue and "provide needed clarity." Pet. App. A. at 41a, 498 F.3d at 69 (Lynch, J., concurring); *see also* Pet. App. A at 33a; 498 F.3d at 66 ("In the aftermath of ... *Ellis* and *Lehnert*, we understand the uncertainty about the constitutionality of charging nonmembers of a union for the costs of extra-unit litigation.").

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[2] Justice Marshall joined Part II of the Court's *Lehnert* Opinion, 500 U.S. at 534 (Marshall, J., concurring in part), in which the Court concluded that "the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union ... mandatory assessments." *Id.* at 516 (referring explicitly to *Ellis*). Significantly, Justice Marshall recognized that his opinion as to extra-unit litigation varied from the Court's majority: "I also **disagree with the Court's decision** that the costs of articles printed in MEA's employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (Marshall, J., dissenting in part) (emphasis added).

The notion that this case is *sui generis* is belied by the serious split among lower courts, evidenced by the conflicting cases cited in the decision below, Pet. App. A at 22a-25a, 498 F.3d at 60-62, the Petition, and the Opp. at 7-8, 15.

II. Respondent Re-Writes *Lehnert* As It Wishes It Had Been Decided, Rather Than Respecting This Court's Actual Conclusions.

Respondent asserts that "Petitioners miss the point of Justices Scalia's reference to *Ellis*," speculating that "Justice Scalia viewed *Ellis* as supporting a rule that only activities that a union is legally required to conduct ... are chargeable," Opp. at 11-12 n.6, but appearing oblivious to Justice Scalia's observation that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in part, dissenting in part).[3] It is not surprising that Respondent ignores Justice Scalia's conclusion, because that conclusion belies Respondent's assertion "that the *Ellis* Court's holding as to extra-unit litigation was a matter of statutory construction of one particular labor act (the Railway Labor Act), not a more general holding." Opp. at 13 (footnote omitted).

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[3] Respondent makes much of Justice Kennedy's observation about application of Justice Scalia's preferred test. Opp. at 9, 11, & 15 n.11. However, what Justice Kennedy said clearly does not establish what Justice Scalia meant. Had that been the case, Justice Kennedy would not have had to write separately, for Justice Scalia would have said what Justice Kennedy, only for himself, wrote.

Even more telling is the fact that, like Justice Scalia, Justice Blackmun viewed *Ellis*' teaching as the constitutional rule: "Because the Court expressly has interpreted the RLA 'to avoid serious doubt of [the statute's] constitutionality,' ... the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union ... mandatory assessments." 500 U.S. at 516 (opinion of Blackmun, J.) (*quoting Machinists v. Street*, 367 U.S. 740, 749 (1961), *and citing Ellis*, 466 U.S. at 444); *accord id.* at 528 ("the Court in *Ellis* determined that the RLA, **as informed by the First Amendment**, prohibits the use of dissenters' fees for extra-unit litigation") (emphasis added).

III. Like the Court Below, Respondent Seriously Misapprehends *Ellis*.

Although *Ellis* is key to the Petition, only a brief portion of the Opposition is devoted to the proposition that Petitioners "misread" *Ellis*. Opp. at 13-14. To the contrary, however, it is Respondent — like the First Circuit — that misreads *Ellis*.

Ellis categorically held that "expenses of litigation not having such a connection with the bargaining unit [*i.e.*, litigation before agencies or in the courts **that concerns bargaining unit employees** and is normally conducted by the exclusive representative] are not to be charged to objecting employees." 466 U.S. at 453 (emphasis added). Respondent nevertheless maintains that *Ellis* really did not decide categorically that unions cannot compel nonmembers to subsidize any extra-unit litigation.

Respondent makes two erroneous arguments as to why *Ellis* is not controlling here. First, disingenuously relying upon a general formulation of the issue appearing earlier in the *Ellis* opinion, it contends "that *Ellis* addressed only 'litigation not involving the negotiation of agreements or settlement of grievances.'" Opp. at 13-14 (*quoting Ellis*, 466 U.S. at 440).

This Court explicitly held nonchargeable in *Ellis* "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings." 466 U.S. at 453. That litigation was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." 685 F.2d 1068, 1074 (9TH CIR. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435, 453 (1984).

"[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative." Nevertheless, it, too, was held nonchargeable by *Ellis*, unless the nonmembers' "bargaining unit is directly concerned." 466 U.S. at 453.

In *Lehnert*, Justice Blackmun recognized *Ellis*' holding that bargaining-related litigation on behalf of other units was nonchargeable by specifically mentioning "union litigation" involving "bankruptcy proceedings" and "employment discrimination," when he ruled that the general principle permitting pooling of otherwise chargeable parent union expenditures does not

apply to extra-unit litigation. 500 U.S. at 528, *citing Ellis*, 466 U.S. at 453.

Second, Respondent argues:

> that *Ellis* is not on point ... because "the *Ellis* court was not confronted with a pooling arrangement ...; its decision pertained only to direct contribution of local union monies to litigation efforts by other units (or a national affiliate) — meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time."

Opp. at 14, *quoting* Pet. App. 27a-28a, 498 F.3d at 63. Not surprisingly, because it cannot do so, Respondent makes no attempt to rebut Petitioners' showing, Pet. at 17, that *Ellis* also involved a "pooling arrangement" — that is, the aggregation of nonmembers' forced fees in a national affiliate's general treasury from which litigation could be funded in any bargaining unit, including the dissenting nonmembers' — not direct contributions of a local's monies to litigation in other units without expectation of later reciprocal contributions.

In short, Respondent's attempts to distinguish *Ellis*, Opp. at 8-11, are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. **Both** Justices Blackmun and Scalia recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here, and should have been applied and followed by the First Circuit.

CONCLUSION

Petitioners end where they began: Justice Scalia's prediction that *Lehnert* established a test that "obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop"; "provides little if any guidance to parties contemplating litigation or to lower courts"; and "does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned." 500 U.S. at 550-51 (dissenting in part). Respondent exploited this confusion to persuade the courts below to evade this Court's existing prohibition against extraction of forced dues for extra-unit litigation, thus defying *Ellis*' proscription.

Therefore, for the reasons stated in the Petition and above, the Petition for a Writ of *Certiorari* should be granted, and the case set for plenary briefing and argument on the important question presented.

Respectfully submitted,

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JOINT APPENDIX

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(6)

No. 07-610

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IN THE

Supreme Court of the United States

DANIEL B. LOCKE *ET AL.*,
Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER, *ET AL.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix in the printed Petition for *Certiorari*:

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United States District Court
For The District Of Maine

Civil No. 2:05-cv-00112-GZS

June 16, 2005 — Complaint [Doc. #1]

June 24, 2005 — Motion for Class Certification [Doc. #5]

June 24, 2005 — Motion for a Preliminary Injunction [Doc. #6]

August 2, 2005 — Order Denying Motion for a Preliminary Injunction [Doc. #39]

August 19, 2005 — Motion for Leave to File First Amended and/or Supplemental Complaint [Doc. #43]

September 14, 2005 — Order Granting Leave to File First Amended and/or Supplemental Complaint [Doc. #46]

September 14, 2005 — First Amended and/or Supplemental Complaint [Doc. #47]

November 23, 2005 — Motion for Class Certification [Doc. #55]

January 24, 2006 — State Defendants' Motion for Summary Judgment [Doc. #64]

January 24, 2006 — Plaintiffs' Motion for Summary Judgment [Doc. #67]

January 24, 2006 — Defendant MSEA's Motion for Summary Judgment [Doc. #69]

March 31, 2006 — Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment and Motion to Certify Class as Moot [Doc. #90]

March 31, 2006 — Judgment in favor of Defendants [Doc. #91]

April 25, 2006 — Notice of Appeal [Doc. #92]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
CASE NO. 06-1747

November 9, 2006 — Case Argued

August 8, 2007 — Opinion — Published — Affirmed

August 8, 2007 — Judgment Entered

August 29, 2007 — Mandate Issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
PORTLAND DIVISION

DANIEL B. LOCKE; *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT, Plaintiffs, v. EDWARD A. KARASS, STATE CONTROLLER, *et al.*, Defendants.	CASE NO. 2:05-cv-00112-GZS **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED**

COME NOW Plaintiffs, Daniel B. Locke, *et al.*, on behalf of themselves and the class they seek to represent, by their undersigned counsel, and pursuant to Rule 65, FED.R.CIV.P., and Civil Rule 7, D.ME., respectfully move the Court for the entry of an Order preliminarily enjoining the actions of Defendants to enforce portions of the "Union Security" or agency shop sections of the collective bargaining agreements between the State of Maine ("State") and Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("MSEA"), Plaintiffs' Verified Class Action Complaint, ¶ 22, pending final disposition of this action.

As more fully discussed in the Memorandum of Points and Authorities accompanying this Motion, the demand for payment of agency fees by Defendants and their collection by and/or for the benefit of MSEA pursuant to these agreements is threatening to occur in the absence of adequate notice and appropriate procedural safeguards, improperly invading and denying the exercise of freedoms protected by the First, Fifth, and Fourteenth Amendments to the United States Constitution, as explained in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6TH CIR. 1991) (directing entry of preliminary injunction); *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6TH CIR. 1988) (reversing denial of preliminary injunction), **further proceedings** 903 F.2d 422 (6TH CIR. 1991); *Damiano v. Matish*, 830 F.2d 1363 (6TH CIR. 1987); *Tierney v. Toledo*, 824 F.2d 1497 (6TH CIR. 1987), **further proceedings**, 917 F.2d 927 (6TH CIR. 1991); *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2D CIR. 1987); *Prescott v. County of El Dorado*, 177 F.3d 1102 (9TH CIR. 1999); *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9TH CIR. 1997), ***cert.* denied** 118 S.Ct. 2160 (1998); *Dean v. TWA, Inc.*, 924 F.2d 805 (9TH CIR. 1991); and *Lucid v. City and County of San Francisco*, 136 LRRM (BNA) 2877 (N.D.CAL. 1991), **further proceedings** 774 F.Supp. 1234 (N.D.CAL. 1991).

The grant of a preliminary injunction is necessary and proper in order to avoid the impending irreparable harm to Plaintiffs and the class they seek to represent ("the Nonmembers"), resulting from the impairment of their First, Fifth, and Fourteenth Amendment rights

by fee collections and/or termination from employment for refusing to authorize fee deductions or otherwise make payment of fees notwithstanding Defendants' failure to provide adequate notice and procedures. No adequate remedy at law exists for the preservation and vindication of those paramount constitutional rights. The Nonmembers are ultimately likely to succeed on the merits of their action, and the harm to the Nonmembers and to the public interest of not granting the requested injunctive relief outweighs any possible harm to Defendants of granting such relief.

Plaintiffs moved as quickly as possible to file this Motion after filing of this action. Owing to the failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, Defendants' demands for fees is unlawful, as would be their collection.

WHEREFORE, Plaintiffs request that the Court immediately issue, pending a full hearing on Plaintiffs' prayer for permanent relief, an Order preliminarily enjoining Defendants Karass, Wyke, and Walo, their agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with it or at its direction or under its control, from collecting agency fees from Plaintiffs and the class Plaintiffs seek to represent, and preliminarily enjoining Defendants, and all of them, their agents, assistants, successors, employees, attorneys, and all other persons acting in concert or cooperation with them or at their direction or under their control from taking any further steps to enforce those portions of the "Union Security" or agency shop sections of the

current collective bargaining agreement between the State and Defendant MSEA until a constitutionally adequate notice has been provided and constitutionally adequate procedures are in place and operating, and further order of this Court.

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This Motion is based upon the attached Memorandum of Law in Support of this Motion, Plaintiffs' Verified Class Action Complaint, and all files and proceedings herein.

DATED: 23 June 2005

Respectfully submitted,

/s/ W. James Young

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANIEL B. LOCKE et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 05-cv-
	)	00112-P-S
EDWARD A. KARASS, State Controller, et al.,	)	
	)	
	)	
Defendant.	)	

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

Before the Court is Plaintiffs' Motion for a Preliminary Injunction (Docket # 6). Plaintiffs are state employees who have declined to become members of the Defendant Maine State Employees Association ("nonmembers" of the "MSEA"). Plaintiffs seek to enjoin the Defendants from collecting service fees from the named plaintiffs and others similarly situated.[1] Plaintiffs bring their claim under 42 U.S.C. § 1983, claiming that the procedure implementing the service fees is unconstitutional under Teachers Local No. 1 v. Hudson, 475 U.S. 292 (1986). More specifically,

[1] A Motion for Class Certification is currently pending before the Court. (See Docket #5.) Because the Court has denied Plaintiffs' motion for a preliminary injunction, the Court need not decide whether the injunction should apply to the entire class absent class certification.

Plaintiffs allege that notice provided to them by the MSEA explaining the service fees is constitutionally inadequate. Plaintiffs seek a preliminary injunction barring the collection of the service fees until the Court can resolve the underlying dispute. Oral argument was held on this matter on July 26, 2005, and at the end of that hearing the Court orally DENIED Plaintiffs motion. The Court now issues this written order reiterating and expanding upon its oral ruling.

I. BACKGROUND

For purposes of Plaintiffs' Motion for a Preliminary Injunction, the Court finds the relevant facts as follows:

MSEA and the State of Maine recently negotiated a provision in their collective bargaining agreement requiring all nonmembers of the MSEA to pay service fees to the union. The agreement sets forth certain procedural requirements that the union must follow in calculating and promulgating the fee, including notice, financial disclosure, and an opportunity to dispute the fee. (See Agreement Between the State of Maine and the Maine State Employees Association, 2005-2007 (Docket #23, Ex. 2) at 55-60 (hereinafter the "CBA").) Also, according to the CBA, employees hired prior to July 2, 2003 who have not been members of the MSEA or fee payers since that date are considered "grandfathered," and will be required to pay only 50 percent of the service fee until June 2006. The named plaintiffs in this case are grandfathered nonmembers subject to this discount.

On April 11, 2005, MSEA mailed out a notice to all employees explaining the new service fees. (See April 11, 2005 Letter to MSEA-SEIU Bargaining Unit

members (Docket #23, Ex. 3) (hereinafter "the April Notice").) The notice calculated the service fee as 73.8 percent of member dues. This calculation was based on the 2003 fiscal-year data of the MSEA and the 2002 fiscal-year data of their national affiliate, the Service Employees International Union ("SEIU"). In calculating the service fee as a percentage of member dues, the notice categorized expenses as either "chargeable" or "non-chargeable" to the nonmembers depending on the union's determination of whether the expense was "germane to collective bargaining and contract administration as defined by law." (CBA at 55.) The notice indicated that the financial data was verified by an independent auditor.

On June 10, 2005, the MSEA mailed members another notice providing updated financial information, based on the MSEA's 2004 expenditures and SEIU's 2003 expenditures. (See June 10, 2005 Letter re: Verified Statement of Certain Rights Regarding Dues and Fees (Docket #23, Ex. 4) (hereinafter "the June Notice").)

On June 16, 2005, Plaintiffs filed the instant lawsuit, challenging the constitutional adequacy of the notice provided to nonmembers about the service fee.

On July 12, 2005, MSEA mailed all nonmembers a revised notice that superseded the April notice and the June Notice. (See July 12, 2005 Letter re: Payment of Service Fees to MSEA-SEIU (Docket #23, Ex. 5) (hereinafter "the July Notice").) The July Notice reclassified the union's organizing-related expenditures as non-chargeable to nonmembers. As a result, the service fee was reduced to 49.13 percent of member dues. Thus, "grandfathered" nonmembers such as Plaintiffs will be assessed only 24.57 percent of

member dues under the new notice. The July Notice also contained updated affidavits and an auditor's statement certifying that the new calculations remain consistent with the audited financial data disclosed in the June Notice.

The MSEA has given nonmembers an opportunity to challenge the July Notice by August 16, 2005. Members that have challenged any of the three notices are scheduled to participate in an arbitration with the American Arbitration Association on October 28, 2005.[2] The July Notice states that nonmembers challenging the service fee calculation will have their service fees placed in an interest-bearing escrow account pending resolution of the arbitration. The MSEA further represents to the Court in a sworn declaration by the union's General Counsel that *all* funds collected from *all* nonmembers will be escrowed subject to the determination of the arbitrator in October. (See Belcher Decl. (Docket #24) ¶ 17.)

Plaintiffs are now seeking a preliminary injunction to prevent the union from collecting the service fees. The MSEA has stated that it would begin deducting the fees from nonmembers on or after July 27, 2005.

II. LEGAL STANDARD

For Plaintiffs to prevail in their motion for a preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure, they bear the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury, (3) that such injury outweighs any harm to the defendant, and (4) that the injunction

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[2] Plaintiffs do not appear to challenge the validity of the arbitration under Hudson, but to the extent that they do, the Court finds it to be adequate.

would not harm the public interest. See, e.g., Largess v. Supreme Judicial Court, 373 F.3d 219, 224 (1st Cir. 2004). "The decision whether to grant relief is based on a balancing of the different factors, with likelihood of success playing a pivotal role." Id.

III. DISCUSSION

The Court has carefully considered the record before it and the arguments of the parties. The Court finds that Plaintiffs have not made a sufficient showing to obtain a preliminary injunction in this case. Specifically, Plaintiff has filed to demonstrate a likelihood of success on the merits. Most of Plaintiffs' Complaint is mooted by Defendants' superseding July 12, 2005 notice. Those claims either not mooted or raised for the first time by the July Notice appear unlikely to succeed on various other grounds. Furthermore, Plaintiffs' request for a preliminary injunction must also be denied because Plaintiffs have failed to demonstrate that the injunction is necessary to prevent irreparable injury.

A. Likelihood of Success on the Merits

1. *Applicable Law*

It is constitutionally permissible for unions to enter into collective bargaining agreements with public employers that require nonmembers to contribute dues to the union in order to avoid "free riders." See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223-224 (1977). "Employees can be made to pay both the direct costs associated with negotiating and administering collective-bargaining agreements and their share of the indirect expenses a union reasonably incurs in performing its duties as their exclusive

representative." Romero v. Colegio de Abogados de Puerto Rico, 204 F.3d 291, 297 (1st Cir. 2000). However, the First Amendment prohibits such fees from being used for "ideological activities not 'germane' to the purpose for which compelled association [is] justified: collective bargaining." Id.

In Local No. 1 v. Hudson, 475 U.S. 292 (1986), the Supreme Court found that the First Amendment demands that public-employee unions follow certain procedures to protect the speech and associational rights of nonmembers. These constitutional requirements include providing (1) "an adequate explanation of the basis for the fee," (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending." Id. at 310.

Plaintiffs challenge only whether the MSEA has complied with the first requirement of Hudson. Plaintiffs also challenge whether there was "a good-faith advance reduction" of nonmembers' fees to account for non-chargeable activities.[3]

In Hudson, nonmembers of the local teachers' union challenged the constitutionality of a service-fee provision in the collective bargaining contract between the union and the city. Id. at 297. The union determined that nonmembers should pay ninety-five percent of the dues charged to members. Id. at 295. However, the union provided little information to members explaining the basis for this calculation. Id.

[3] Plaintiffs assert that this alleged "good-faith advance reduction" requirement is an implicit fourth prong of Hudson. The Court does not agree that such a claim falls under Hudson, as it explains in Part III.A.4 *infra*.

at 306-307. The union also established a procedure for objecting to the service fees. Id. at 296. Nonmembers could object to the ninety-five percent figure within thirty days after the first deduction from their paychecks. Id. Objections would be considered first by the union's Executive Committee, then by the union's Executive Board, and finally by an arbitrator selected by the union's president. Id. If the objector prevailed, she would receive a rebate of any fees found to be wrongfully deducted. Id. All other nonmembers would have future fees reduced by the same amount. Id.

The Court ruled that the procedures established by the union were insufficient to protect employees' First Amendment rights against compelled speech and association. Id. at 310. It ruled that nonmembers' collections must be placed in escrow, rather than simply refunded from union coffers. Id. It also ruled that the arbitration process must be more independent from the union. Id. at 308.

The Court also found that the union had provided nonmembers with inadequate information about the basis for the proportionate share calculation. See id. at 306. The Court held that the union, not the nonmembers, bears the burden of proving that the ninety-five percent figure was correct. Id. Therefore, the union should have provided details of the fee calculation to all nonmembers regardless of whether they filed an objection to the fees. Id. Specifically, the union should have detailed "the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members – and for which nonmembers as well as members can fairly be charged a fee," not just "the amount that [the union] admittedly had expended for

purposes that did not benefit dissenting nonmembers." Id. "Major features" of the disclosure to nonmembers should include "major categories of expenses" and "verification by an independent auditor," Id. at 307 n. 18. However, the Court noted that "absolute precision" in the calculation of the fee "cannot be expected or required." Id.

In arguing that they have a likelihood of success on the merits, Plaintiffs rely heavily on Hudson. However, as discussed below, Hudson and its progeny simply do not support Plaintiffs' position as applied to the specific facts of this case.

2. *Mootness*

Many of Plaintiffs' arguments in its motion were addressed by the MSEA's July Notice, which superseded the April and June Notices. This notice used updated financial data, declared organizing expenses to be non-chargeable to nonmembers, provided some additional disclosure regarding SEIU expenditures to local affiliates, and reduced the service fee to 49.13 percent of member dues. These changes address some of the most serious charges brought against the union by Plaintiffs. Seeking to preserve these claims, Plaintiffs argue that the mootness doctrine should not apply in this case because the allegedly illegal conduct was ceased voluntarily.

Article III of the Constitution prohibits federal courts from deciding cases or controversies that have been rendered moot by subsequent events. United States v. Reid, 369 F.3d 619, 624 (1st Cir. 2004). Courts must find a case moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome of the

controversy. Thomas R.W. v. Mass. Dept. of Educ., 130 F.3d 477, 479 (1st Cir. 1997). Even if an actual case or controversy exists at the start of litigation, a case may be rendered moot "if changed circumstances eliminate any possibility of effectual relief." Me. Sch. Admin. Dist. No. 35 v. R., 321 F.3d 9, 17 (1st Cir. 2003).

However, the mootness doctrine contains an exception for voluntary cessation of allegedly illegal conduct. See United States v. W.T. Grant Co., 345 U.S. 629, 632 (U.S. 1953). Voluntary cessation will only moot a dispute when (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 70 (1st Cir. 2005). The burden is on the Defendant to establish these factors. Id.

The Court notes first that the primary purpose of the constitutional doctrine set forth in Hudson, on which Plaintiffs base their suit, is designed to protect Plaintiffs' funds from being used for ideological or other non-chargeable purposes. In determining whether the July Notice moots Plaintiffs claims under the April Notice, the Court must not lose sight of the fact that it is Plaintiffs' substantive First Amendment rights that are ultimately at issue in this case. If there is no realistic possibility that Plaintiffs' funds will actually be used for unconstitutional purposes, Plaintiffs procedural arguments are ultimately fruitless.

Plaintiffs point out that the voluntary cessation exception prevented the Supreme Court in Hudson from considering changes made by the defendant union to its service fee arrangement during the course of that litigation. See Hudson, 475 U.S. at 305 n.14. However,

Hudson is distinguishable from the present case. In Hudson, the union placed the disputed service fees in escrow during the course of the litigation in a likely attempt to evade judicial review. The change was made entirely at the defendant's discretion with no notice or procedural safeguards for the plaintiff nonmembers. As the lower count explained, the union had "no commitment to continue the escrow in the future [and] had not indicated the terms of the escrow." Id. at 300. In contrast, the MSEA's July Notice was made according to a fixed procedure set forth in the CBA. That agreement requires that nonmembers be provided notice of the service fee – including financial data regarding how it was calculated – and an opportunity to object to the fee's calculation or imposition before an impartial mediator. In short, the concerns that underlie the "voluntary cessation" exception to the mootness doctrine – that actors will change their positions for the purpose of avoiding litigation only to revert to their old ways when the threat has passed – is not applicable in this case, in which the actor is legally and contractually obligated to provide potential victims significant procedural rights upon every change in policy. Were there some indication that Defendants were unable or unwilling to live up to the obligations to nonmembers expressed in their collective bargaining agreement, the Court might rule differently. However, the Court sees no reason in the record to believe this to be the case.

Furthermore, Plaintiffs' complaint about the accuracy and adequacy of the financial data disclosed by Defendant in the April Notice is mooted for another reason: with the July Notice, Defendants have now provided much of the financial information sought by

Plaintiffs, arguably enabling them to exercise their constitutional right to object to the fee calculations. Defendants cannot now "revert to their old ways" as far as these Plaintiffs go – they cannot erase the provided information from the minds of the Plaintiffs.

Because the July Notice supersedes the April Notice, many of Plaintiffs arguments are now moot. Plaintiffs' argument that the 2003 financial data for the MSEA provided in the April Notice is "stale" is mooted by the union's provision of 2004 financial data in the July Notice. Plaintiffs' argument that "organizing" is not a chargeable activity is mooted by the July Notice's recategorization of "organizing expenses" to the "non-chargeable" category. Finally, Plaintiffs argument that the SEIU failed to disclose the nature of funds paid to SEIU affiliates is mooted by the provision of notes by the SEIU's auditor in the July Notice, explaining the basis for dividing these "payments to locals" between chargeable and non-chargeable expenses.[4]

3. *Issues Not Corrected or Newly Arising in the July Notice*

The Court turns now to the issues raised by Plaintiffs that are either not mooted by the July Notice

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[4] In their Reply (Docket #30), Plaintiffs maintain that the July Notice did not correct the inadequate disclosure of payments to local affiliates. However, Hudson clearly states that only "major categories of expenses" are required in the financial disclosure. Hudson, 475 U.S. at 307 n.18. The Court finds that the breakdown of expenses (July Notice at 23) coupled with the auditor's notes explaining the allocation of funds within the category (id. at 27) fully complies with the requirements of Hudson and provides nonmembers with sufficient information to determine whether or not to object.

or raised for the first time by the July Notice.

a. *Sufficiency of the audit*

Plaintiffs' argument that the financial disclosures in the July Notice were "reviewed" rather than "audited" by an independent auditor is without merit. Plaintiffs cite a Ninth Circuit case for the proposition that Hudson's prescription of "verification by an independent auditor," 475 U.S. at 307 n.18, requires a specific type of audit that provides "at least some verification of the amounts disclosed in the financial statement." Prescott v. County of El Dorado, 177 F.3d 1102, 1106-1107 (9th Cir. 1999). However, even if this Court were to accept the distinction urged upon it by Plaintiffs, the letter from the auditor included in the July Notice (July Notice at 11) establishes to the Court's satisfaction that a full audit of the union's 2004 fiscal year as defined in Prescott was undertaken.

While the auditor did not conduct an entirely new audit after the MSEA's decision to recategorize organizing expenses from chargeable to non-chargeable, it is implausible that Hudson requires such an undertaking. The recategorization of an expense from the chargeable to the non-chargeable category is the decision of the union, not the auditor. It is not clear to the Court that Hudson requires *any* review of such policy changes by an auditor. However, if review is required, the review provided by the MSEA's auditor was certainly sufficient. It is clear from the record that the auditor examined the union's recalculation of the service fees under the new formula and confirmed that it properly utilized the 2004 financial data, which had previously been fully verified by the auditor, in making its calculations. The Court is entirely satisfied that

this undertaking by the auditor fully satisfies the requirements of Hudson, if indeed it does not surpass them.

b. *Use of allegedly "stale" and incompatible financial data*

Plaintiffs argue that the SEIU financial data from 2003 used in the July Notice is still "stale" and is incompatible with the use of MSEA's 2004 financial data. This claim is unavailing. Contrary to Plaintiffs' arguments, Hudson cannot be read as holding that financial data over one year old renders a notice per se unconstitutional. In approving the union's use of year-old financial data, the Hudson court was expressing the view that courts should take a forgiving approach in reviewing financial disclosures, noting that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required." 475 U.S. at 307 n.18.

For the same reason, the Court finds that use of financial data from different years for the MSEA and the SEIU respectively in the July Notice is permissible under Hudson. Although the result would obviously be at least slightly different had the union used 2004 data for both the SEIU and the MSEA,[5] any small discrepancies caused by the use of different data are as likely to benefit the nonmembers as harm them in the short term. Furthermore, such discrepancies will entirely average out over the long term. Thus, absent any evidence of intentional "cherry picking" of financial

[5] Defendant MSEA admits as much in its Response (Docket #23), noting that the service fees would have been higher had the union used 2003 data for both unions in calculating the proportionate share.

data by the union to increase its fees, the Court finds no constitutional problem with the use of a different year's financial information for an affiliate.

c. *Adequacy of time between notice and collection*

The July Notice was mailed on July 12, 2005. Nonmembers have until August 16, 2005 to object. However, fees may be collected as soon as July 27, 2005. Plaintiffs argue that this timeline is simply too compressed to protect nonmembers' First Amendment right to object to the fee calculation.

The Court agrees with Plaintiffs that Hudson's admonition that service fees cannot be used for non-chargeable expenses even if they are later refunded strongly implies that notice of the service fee must allow time for nonmembers to assess the union's financial disclosures and decide whether to object before the fee is collected. However, given the specific deadlines at issue in this case, the Court is not convinced that there is any violation of Hudson.

Plaintiffs do not explain why they believe that two weeks constitutes inadequate notice. They complain merely that the deadline for objection is three weeks after the fees will be collected. However, the Court does not believe that the August 16, 2005 deadline is relevant to the analysis under Hudson. It is the date on which collection of the fees begins that threatens to cause injury to Plaintiffs. In this case, the Court finds that the July 27, 2005 deadline for collection provides an adequate period for objection prior to collection under Hudson. Plaintiffs were given two weeks to review the July Notice and object before collection of fees would begin. There is nothing to stop nonmembers concerned about their rights from

objection within this period.

4. *Categorization of certain activities as chargeable*

Although the July Notice renders most of Plaintiffs' claims about the categorization of expenses moot, any remaining claims of miscategorized expenses are unlikely to succeed for an additional reason. Plaintiffs rely on Hudson in presenting their claim that the April and July Notices miscategorize certain expenses as chargeable. They assert that Hudson requires unions to make a good-faith effort to determine the correct proportionate share in advance, a determination that is then challengeable in District Court.

The Court does not agree with this interpretation of Hudson. It appears to the Court that Hudson is focused solely the adequacy of the notice to the nonmember – in other words, whether the notice gives the nonmember enough information to decide whether to object. There is no implicit "fourth prong" of Hudson imposing an additional substantive requirement that the notice get the categorization of expenses correct. Assuming the union's notice is adequate enough to protect nonmembers' ability to determine whether to object, Hudson holds that an impartial arbitrator and the escrowing of objectors' fees pending resolution of the complaint is sufficient to safeguard the nonmembers' constitutional rights. The Court notes that several Circuits, including the Second, Third, Fourth, Ninth, and Eleventh have held that an escrow of service fees that complies with Hudson's requirements adequately protects nonmember's First Amendment rights. See Grunwald v. San Bernardino City Unified Sch. Dist., 994 F.2d 1370, 1374 (9th Cir. 1993), Gibson v. The Florida Bar, 906 F.2d 624, 631

(11th Cir. 1990), *cert. dismissed*, 112 S. Ct. 633 (1991); Crawford v. Air Line Pilots Ass'n Int'l, 870 F.2d 155, 161 (4th Cir. 1989); Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989); Andrews v. Education Ass'n, 829 F.2d 335, 339 (2d Cir. 1987).[6] Indeed, these holdings seem to best comport with the Supreme Court's suggestion in Ellis v. Brotherhood of Railway, Airline & Steamship Clerks that "advance reduction of dues and/*or* interest-bearing escrow accounts" would protect nonmembers from any First Amendment violations. 466 U.S. 435, 444 (1984) (emphasis added).

In this case, the MSEA represented in its July Notice that it will place the service fees of all objectors in escrow pending the resolution of the October arbitration. The General Counsel of the MSEA has also stated in a sworn declaration that the MSEA will hold all service fees collected from nonmembers in escrow until the resolution of the October arbitration. (Belcher Decl. (Docket #24) ¶ 17.) Plaintiffs do not challenge this sworn statement and the Court sees no reason to disbelieve it. Given this state of affairs, it appears clear that there is no constitutional violation under Hudson even if Plaintiff is correct that the union has miscategorized expenses as chargeable.

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[6] The First Circuit has not directly considered the issue, although it has decided a case involving the use of bar dues for ideological purposes that strongly suggests it would consider an "objection-and-escrow" procedure to be appropriate. See Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990). Only the Sixth Circuit – whose cases Plaintiffs rely upon heavily – requires a good faith attempt by the Union at advance reduction in addition to escrow of challenged funds.

B. Irreparable Injury

In addition to the grounds already stated for denying Plaintiffs' motion, the Court does not believe that Plaintiffs have adequately demonstrated that a preliminary injunction is necessary to prevent irreparable injury. There can be no doubt that inadequate or inaccurate notice by a union seeking to collect service fees could result in nonmembers failing to object to truly unconstitutional fee calculations, thereby resulting in the use of their service fees for ideological or other nonchargeable purposes. Such an injury may well be irreparable. See Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") However, in determining whether there will be irreparable First Amendment injury absent an injunction, the Court must examine not only whether the claim involves First Amendment freedoms generally, but also whether the facts of the case suggest actual substantive First Amendment harm is imminent. Cf. Rushia v. Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983) (holding that a preliminary injunction declaring a law prohibiting the display and sale of indecent publications to minors unconstitutional was unnecessary for lack of irreparable injury where the plaintiff-storeowner did not allege that he was deterred by the threat of prosecution under the law). As noted above, the union intends to place all nonmember funds in escrow pending the determination of the arbitrator.[7]

[7] The Court also notes that the named Plaintiffs, as "grandfathered" nonmembers, will be required to pay only half of the service fee until July 2006. Thus, even if the fees were not placed

(continued...)

Thus, given this arrangement, the Court cannot see how Plaintiffs' or putative class members' constitutional rights could be irreparably harmed. Rather, it appears that Plaintiffs' constitutional right against compelled speech will be protected until their case is heard by the arbitrator.

Finally, the Court has already discussed the effect of the superseding July Notice on Plaintiffs' likelihood of success on the merits. The Court also finds that, irrespective of whether the July Notice moots Plaintiffs' claims under the April Notice, the July Notice ameliorates the risk of irreparable injury with regard to alleged problems with the April Notice insofar as they were corrected in the July Notice. Even if the "voluntary cessation" exception were to apply, the July Notice is still legally and contractually binding upon the MSEA. Therefore, the alleged problems of the April Notice pose only an abstract and theoretical risk of harm to Plaintiffs – certainly not a risk requiring the protection of a preliminary injunction.

IV. CONCLUSION

For these reasons, Plaintiffs request for a preliminary injunction is hereby DENIED.

SO ORDERED.

/s/ George Z. Singal
Chief U.S. District Judge

Dated this 2nd day of August, 2005.

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[7] (...continued)
in escrow, the Court thinks it highly unlikely that Plaintiffs will be forced to pay more than their proportionate share prior to July 2006.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
PORTLAND DIVISION

DANIEL B. LOCKE; *et al.*; AND BETH L. WEIRICH; ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT, Plaintiffs, v. EDWARD A. KARASS, STATE CONTROLLER; *et al.*, Defendants.	CASE NO. 2:05-cv-00112-GZS **PLAINTIFFS' FIRST AMENDED AND/OR SUPPLEMENTAL CLASS ACTION COMPLAINT** **INJUNCTIVE RELIEF SOUGHT**

COMPLAINT

1. This is a civil rights action pursuant to 42 U.S.C. § 1983, seeking equitable relief, declaratory relief, nominal damages and other relief to prevent and/or redress the deprivation under color of Maine law of Plaintiffs' rights, privileges and immunities under the United States Constitution. Defendants are threatening to deprive, and have actually deprived, Plaintiffs and the class Plaintiffs seek to represent of their constitutional rights. Specifically, Defendants Edward A. Karass, Controller for the State of Maine,

and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, have agreed to compel the payment of union dues or agency fees (so-called "service fees") from the wages of Plaintiffs, and each member of the class Plaintiffs seek to represent, in order to tender same to Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC, and have actually demanded payment of such fees by each Plaintiff, and each member of the class Plaintiffs seek to represent, with payments to begin in July 2005. These demands have been conducted in a manner which violates Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights as set forth by the United States Supreme Court in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986). Unless this Court enters a preliminary and permanent injunction against Defendants to prevent the enforcement of Defendants' forced-dues scheme, Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights will be irreparably damaged.

JURISDICTION AND VENUE

2. This action arises under the Constitution and laws of the United States, particularly the First, Fifth, and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court, therefore, is invoked under 28 U.S.C. § 1331.

3. This is also an action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the threatened deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs and class members by the Constitution of the United States, particularly the First, Fifth, and Fourteenth

Amendments thereto. The jurisdiction of this Court, therefore, is invoked under 28 U.S.C. § 1343, pursuant to which this Court may grant: a) nominal damages for the violation of Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights; b) restitution of fees unconstitutionally collected from Plaintiffs and class members, and other equitable relief; c) permanent injunctive relief against any unlawful demand for and/or collection of agency fees; and d) reasonable attorneys' fees and costs, pursuant to 42 U.S.C. § 1988.

4. This is also a case of actual controversy where Plaintiffs seek a declaration of their rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights of Plaintiffs and grant further necessary and proper relief based thereon, including preliminary and permanent injunctive relief, pursuant to Rule 65, FED.R.CIV.P.

5. **Venue:** Pursuant to 28 U.S.C. § 1391(b) and § 1392, venue is proper in this Court because Defendants either reside and/or have offices and conduct their business in the judicial district of the United States District Court for the District of Maine.

PARTIES

6. Plaintiffs Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, and Beth Weirich are, and were at all times mentioned herein, individuals employed by various

departments, agencies, and/or commissions of the executive branch of the State of Maine. As such, each is a "state employee" within the meaning of the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979-A(6). Each of the named Plaintiffs is employed in one of the four bargaining units represented by Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO, CLC ("MSEA"), designated as the Administrative, Professional & Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units. Plaintiffs are not members of MSEA and have not been members of MSEA at any time material hereto.

7. Defendant Edward A. Karass (hereinafter "Karass") is the Controller of the State of Maine. As such, he is charged with the responsibility of issuing wages to employees of the State, including Plaintiffs and members of the class Plaintiffs seek to represent, and processing all deductions therefore, including for union dues and/or so-called "service" fees pursuant to "union security" agreements. He is sued in his official capacity.

8. Defendant Rebecca M. Wyke (hereinafter "Wyke") is the Commissioner of the Department of Administrative and Financial Services for the State of Maine. As such, Defendant Wyke is responsible for overseeing all aspects of the civil service system and employee training and benefits, including the negotiation and administration of relations between the State and labor unions representing State employees, and she is a signatory to all collective bargaining agreements negotiated with the State. She is sued in her official capacity.

9. Defendant Kenneth A. Walo (hereinafter "Walo") is Director of the Bureau of Employee Relations of the Department of Administrative and Financial Services for the State of Maine. As such, Defendant Walo is the primary official of the State of Maine charged with responsibility for negotiating and administering relations between the State and labor unions representing State employees, and he is a signatory to all collective bargaining agreements negotiated with the State. He is sued in his official capacity.

10. Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO, CLC ("MSEA" or "the union") is a "bargaining agent" as defined in the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979-A(1), and has been recognized as the exclusive representative under said law for collective bargaining purposes of all employees in Administrative, Professional & Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units. On information and belief, Defendant MSEA is a non-profit corporation formed and existing under the laws of the State of Maine. MSEA conducts its business and operations throughout the State of Maine.

CLASS ACTION ALLEGATIONS

11. Plaintiffs' action is a class action brought by Plaintiffs on their own behalf and on behalf of others similarly situated, pursuant to Rule 23(b)(1)(A) and (b)(2), FED.R.CIV.P. The class that Plaintiffs seek to represent consists of: all State of Maine employees employed in the Administrative, Professional &

Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units who were or are represented exclusively for purposes of collective bargaining by MSEA and who were or are subject to demands for payment of union dues or "service" fees to MSEA as a condition of continued State employment.

12. The number of persons in this class is believed to number approximately 2,000-3,000. These persons are therefore so numerous that joinder of all members of the class obviously is impractical.

13. There are questions of law and fact common to all members of the class, to-wit, whether Defendants have demanded payment of agency fees from the Nonmembers prior to providing them with all of the notice and procedural safeguards required by the First, Fifth, and Fourteenth Amendments to the United States Constitution as prerequisites to the collection of compulsory agency fees from nonunion employees.

14. Plaintiffs' claims are typical of other members of the class, who are: (1) subject to the same deprivations of their rights by Defendants' implementation of the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.*, as hereinafter alleged; and (2) subject to the same threatened deprivations of their rights by Defendants' demand for and/or collection of compulsory agency fees in the absence of the constitutionally-required notice and procedural safeguards, as hereinafter alleged.

15. Plaintiffs can adequately represent the interests of other members of the class. Plaintiffs have no interests antagonistic to other members of the class related to the subject matter of this lawsuit. Plaintiffs are members of the class and, like all current and future nonunion State employees in the relevant

bargaining units, were, are, and will be "potential objectors" as that term was used by the United States Supreme Court in *Hudson*, 475 U.S. at 306.

16. Plaintiffs' attorneys are experienced in representing similarly-situated litigants before the various federal courts. Plaintiffs' counsel is provided *pro bono publico* by a national charitable legal aid organization, and their lead counsel is experienced in representing nonunion employees in litigation, including class actions, involving issues identical or similar to those raised in this action, and in fact, has litigated many of the leading cases addressing these issues.

17. Because Defendants have a duty under *Hudson* to provide notice and procedural protections adequate to protect the First, Fifth, and Fourteenth Amendment rights of nonunion employees — which duty applies equally to all class members — the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants.

18. Defendants have acted and threaten to continue to act on grounds generally applicable to all members of the class, thereby making appropriate final injunctive and declaratory relief with regard to the class as a whole.

19. The questions of law and fact common to the members of the class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, because the individual class members are deprived of the same rights by Defendants' actions and threatened actions,

and differ only in non-material aspects of their factual situation.

CAUSE OF ACTION

20. Acting in concert under color of state law — to-wit, the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.* — the State of Maine has recognized MSEA as the exclusive bargaining agent for the Plaintiffs and other State employees in bargaining units designated as the: (1) Administrative; (2) Operations, Maintenance, and Support; (3) Professional & Technical; and (4) Supervisory Services bargaining units.

21. Pursuant to the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.*, the State of Maine (represented by, *inter alia*, Defendants Wyke and Walo) and MSEA have entered into a series of collective bargaining agreements (CBAs) controlling the terms and conditions of employment for Plaintiffs and the class of state employees Plaintiffs seek to represent ("the Nonmembers"). The current CBA for each unit identified in ¶ 20, *supra*, is effective by its terms from 1 July 2005 through 30 June 2007.

22. For each unit identified in ¶ 20, *supra*, the State and MSEA have negotiated provisions providing, *inter alia*, that:

> Any employee covered by this Agreement shall, as a condition of employment, be required to choose from the options of membership in MSEA-SEIU or payment to MSEA-SEIU of a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract

administration as defined by law. The amount of the fee charged to certain employees hired prior to July 2, 2003, who were not members of MSEA-SEIU on that date, will be capped for approximately the first year of the contract, as provided under the subsection titled "Calculation of Service Fee."

Employees shall be required to (a) sign a written payroll deduction authorization form authorizing deduction from their pay of the membership dues or service fee, or (b) tender the amount of the service fee due to the union, or (c) indicate in writing their religious objection to such fee and make contributions at least equal in amount to the service fee to a non-religious charitable organization mutually agreed upon by the employee so objecting and the Union. Employees choosing (b) or (c) shall make payments within ten (10) days after each payday.

The obligation to pay fees or dues shall become effective as follows:

a. For employees first hired after December 1, 2004, the payment obligation shall be effective at the start of the pay period commencing closest to but not earlier than the thirtieth day after the end of their initial six months of probation;

b. For all other employees, the period commencing closest to but not earlier than July 1, 2005. This obligation shall be implemented simultaneously with

the salary increase scheduled for July 2005.

23. In addition to authorizing the exaction of union dues and/or so-called "service" or agency fees from nonunion employees, each such article contains a provision entitled "Indemnification," as follows:

> MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless against any claim, demand, suit, cost, expense, damages, or any other form of liability, including attorneys' fees, costs, or other liability arising from or incurred as a result of any act taken or not taken by the State, its members, officers, agents, employees, or representatives in complying with or carrying out the provisions of this Article, including, but not limited to, as a result of being ordered to reinstate an employee terminated at the request of MSEA-SEIU for not paying the service fee; in reliance on any notice, letter, or authorization forwarded to the State by the union pursuant to this Article; and including but not limited to any charge that the State failed to discharge any duty owed to its employees arising out of the service fee deduction. MSEA-SEIU will intervene in and defend any administrative or court litigation concerning the propriety of any act taken or not taken by the State, including, but not limited to, termination for failure to pay the service fee. In such litigation the State shall have no obligation to defend its act taken or not taken.

24. On or after 11 April 2005, the Nonmembers received from Defendant MSEA: (1) a two-page memorandum; (2) a four-page, 11" x 17" tabloid-style document on newsprint identified as the "Notice of Rights Concerning MSEA-SEIU Membership, Dues and Fees"; and (3) a dues checkoff authorization card. True and correct copy of said documents is attached hereto and incorporated herein as Exhibits A(1), A(2), and A(3), respectively. In order to comply with Court Rules regarding the size of Exhibits, Exhibit A(2) has been reduced in size, and reproduced as a single-sided document.

25. On or about 11 May 2005, the Nonmembers received from Defendant Walo an e-mail communication stating "your need to either become a member of the Maine State Employees Association or pay a service fee beginning in July 2005," and electronically attaching two documents. True and correct copies of the forwarded e-mail, redacting that portion protected by the attorney-client privilege, and its attachments, are attached hereto and incorporated herein as Exhibits B(1), B(2), and B(3), respectively.

26. On or after 10 June 2005, the Nonmembers received from Defendant MSEA: (1) a five-page memorandum; and (2) a two-page affidavit signed by Joan Towle. True and correct copy of said documents is attached hereto and incorporated herein as Exhibits C(1), and C(2), respectively.

27. On or after 12 July 2005, the Nonmembers received from Defendant MSEA: (1) a seven-page memorandum; (2) a two-page affidavit from Joan Towle; (3) a one-page "Revised Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses with Organizing as Non-

Chargeable" for the year ended 31 December 2004; (4) a one-page letter to MSEA's Executive Director, dated 7 July 2005, signed by Kathleen Tyson, a partner in the accountancy firm Runyon Kersteen Ouellette; (5) an eight-page copy of the "Audited Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses and Supporting Documents" for the year ended 31 December 2004 for MSEA; (6) an eleven-page copy of the "Consolidated Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses — Alternative Basis for Allocation" for the year ended 31 December 2003 for the Service Employees International Union, AFL-CIO, CLC, United States Division; and (7) a five-page copy of the forced-unionism provisions applying for 2005-2007 for the Professional and Technical, Supervisory, Administrative and Operations, and Maintenance and Support Units. True and correct copies of said documents is attached hereto and incorporated herein as Exhibits D(1), D(2), D(3), D(4), D(5), D(6), and D(7), respectively.

28. On or after 12 July 2005, those Nonmembers who had, after receiving the 11 April 2005 notice, Exhibits A(1), A(2), and A(3) hereto, received a one-page memorandum from MSEA, "providing [them] with an additional opportunity to decide whether [they] want to resign [their] membership in MSEA-SEIU and instead pay" an agency fee. A true and correct copy of said memorandum is attached hereto and incorporated herein as Exhibit E.

29. Notwithstanding Defendants' demands that the Nonmembers' pay to Defendant MSEA "service" fees and/or full union dues, Defendants failed to provide

constitutionally-adequate notice of the Nonmembers' rights and constitutionally-adequate procedural safeguards which are required by the United States Supreme Court's decision in *Hudson*, *supra*, because:

a. Defendants failed to provide constitutionally-adequate notice or explanation of the amount of the agency fee, or total MSEA expenditures allocated into understandable, useful, and lawful chargeable and non-chargeable categories; and

b. Defendants failed to provide a constitutionally-adequate allocation of MSEA's chargeable and nonchargeable expenditures, or those of its affiliates, and a constitutionally-adequate "advance reduction" of the fee.

30. MSEA's agency fee procedure communicated in its initial notice to the Nonmembers, Exhibits A(1), A(2), and A(3), is constitutionally inadequate in that it fails to comply with the Supreme Court decision in *Hudson*, *supra*, in many respects, including but not limited to the following:

a. the procedure fails to provide for an adequate explanation of the allocation of the agency fee broken into understandable, useful, and lawful categories of chargeable and non-chargeable categories; and

b. the procedure fails to provide an adequate advance reduction of the fee, as Defendant MSEA claims that it is entitled to exact from nonmembers constitutionally nonchargeble organizing expenditures for itself and for its affiliate(s).

31. The demands for payment of agency fees from the Nonmembers by Defendant Walo, on behalf of MSEA, beginning on or about 11 April 2005, under

color of state law, without providing all of procedural protections required under the United States Constitution, violates their rights, privileges, and immunities granted by the First, Fifth, and Fourteenth Amendments to the United States Constitution, and in violation of 42 U.S.C. § 1983.

32. Said demands for payment of agency fees occurred without the appropriate safeguards and procedural protections that are necessary for the constitutional collection of agency fees, to-wit:

a. The demand for payment of agency fees made to the Nonmembers, as described above in ¶¶ 24-28, has occurred and threatens to continue to occur without the required and adequate disclosure of the major categories of MSEA's expenditures, and allocation between chargeable and nonchargeable components, verified by an independent audit;

b. The demand for payment of agency fees made to the Nonmembers, as described above in ¶¶ 24-28, has occurred and threatens to continue to occur without the required audit of union expenditures and the adequate allocation between chargeable and nonchargeable categories of expenditures for each and every MSEA affiliate; and

c. The demand for payment of agency fees made to the Nonmembers, as described above in ¶¶ 24-28, has occurred and threatens to continue to occur without the required adequate advance reduction of the fee for MSEA and for each and every MSEA affiliate.

33. Defendants' agency fee procedures violate the First, Fifth, and Fourteenth Amendments to the

United States Constitution in that it requires payment of agency fees:

a. even though Defendants have not established a constitutionally adequate procedure for providing notice of the basis for the amount of the agency fee; and

b. before all of the constitutionally required safeguards and protections, including an adequate advance reduction of the fee, have been given.

34. The Nonmembers claim their constitutional rights, as enunciated by the Supreme Court in *Hudson*:

a. to be provided with **all** of the precollection safeguards and procedures that will ensure that none of their wages are either collected nor spent for improper purposes; and

b. to pay only their *pro rata* share of MSEA's and its affiliates' costs of collective bargaining, contract administration, and grievance adjustment with the State of Maine.

35. Plaintiffs object, on behalf of themselves and the class they seek to represent, to the collection and/or expenditure of any amounts for purposes other than their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment for their individual bargaining units.

36. On information and belief, portions of the dues demanded by Defendants will be used by Defendant MSEA and/or its affiliates for purposes that are not "germane" to collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding "free riders," and/or significantly add to the burdening of free speech that is inherent in the allowance of an "agency shop," including, but not limited to:

a. lobbying and other political activities that do not concern legislative ratification of, or fiscal appropriations for, the dissenting nonmember's collective bargaining agreement;

b. otherwise chargeable activities that do not ultimately enure to the benefit of the employees in the dissenting nonmember's bargaining unit;

c. litigation that does not concern the dissenting nonmember's bargaining unit and union literature reporting on such activities;

d. public relations activities; and

e. organizing and membership activities undertaken to protect or strengthen MSEA's or its affiliates' existing status as exclusive bargaining representatives.

37. On information and belief, portions of the fee collected and/or demanded by Defendant MSEA will be used by MSEA and/or its affiliates for purposes which Defendant cannot prove to be constitutionally chargeable to nonmembers because MSEA, and/or its affiliates, have failed to maintain contemporaneous business records showing the chargeable or nonchargeable nature of the expenses and/or the time of salaried employees.

Claim For Relief

(Violation of 42 U.S.C. § 1983 and the Constitution of the United States)

Plaintiffs and class members reassert the foregoing and further allege:

38. The Nonmembers' decision not to join and pay dues to MSEA and its affiliates is an exercise of their rights to freedom of speech, association, petition, belief, and thought guaranteed against state action by the

First, Fifth, and Fourteenth Amendments to the United States Constitution. The actions of Defendants Karass, Wyke, Walo, and MSEA, acting in concert to authorize, negotiate, and enforce an agreement compelling the Nonmembers to pay agency fees to MSEA, and its affiliates, even for their costs of exclusive representation on behalf of the Nonmembers' bargaining units, infringes upon those fundamental rights.

39. The First and Fourteenth Amendments to the United States Constitution require that the procedures for the involuntary collection of so-called "service" fees be carefully tailored to limit the infringement on the fundamental rights of nonunion employees to serve the compelling state interest that justifies such fees in the manner least restrictive of the nonunion employees' freedoms of speech, association, petition, belief, thought, and due process.

40. Defendants' failure to provide a constitutionally-adequate notice — including a constitutionally-adequate advance reduction of the fee — violates the Nonmembers' First, Fifth, and Fourteenth Amendment rights under the United States Constitution and the *Hudson* decision, in that Defendants have demanded the payment of agency fees even though they have represented to the Nonmembers that they can be compelled to subsidize the organizing activities of MSEA and/or its affiliates.

41. Defendant MSEA's materials do not give sufficient information to gauge the propriety of the union's fee, but nevertheless require objection based upon them.

42. Defendants' demands for payment of agency fees violate the First, Fifth, and Fourteenth

Amendments to the Constitution of the United States in that the materials provided to the Nonmembers, described at ¶¶ 24-28, do not provide a constitutionally-sufficient advance reduction of the fee.

43. Defendants threaten to deprive the Nonmembers of their First- and Fourteenth-Amendment rights, as enunciated and specified in *Hudson*, to be free from compulsory dues requirements in the absence of appropriate safeguards and procedural protections prior to the collection of agency fees.

44. Specifically, the materials provided to the Nonmembers, Exhibits A(1), A(2), A(3), C(1), C(2), D(1), D(2), D(3), D(4), D(5), D(6), and D(7), violate the First, Fifth, and Fourteenth Amendments to the Constitution in that they treat as chargeable union expenditures made for organizing.

45. As a direct result of Defendants' unlawful actions described herein, the Nonmembers have:

a. been deprived of their right to adequate notice and procedural protections prior to any demand for and/or collection of agency fees;

b. been prevented from exercising their rights and privileges as citizens of the United States to decline to support union activities not constitutionally chargeable to dissenting nonmembers and to have those monies used, even temporarily, for such activities;

c. threatened with the deprivation of their civil rights guaranteed to them under the Constitution and statutes of the United States; and

d. have suffered the threat of irreparable harm, damage, and injury for which there is no adequate remedy at law that is inherent in the

threatened violation of their First Amendment rights.

46. Unless enjoined by this Court, Defendants and/or their agents will continue to threaten and/or will actually engage in the aforesaid deprivation and abridgement of the First Amendment rights of the Nonmembers, thereby causing irreparable harm, damage, and injury for which there is no adequate remedy at law.

47. The "hold harmless" or indemnification sections of the CBAs are void as against public policy, invalid, and unenforceable, insofar as they cause the State and its officers to ignore consideration of whether the collection of agency fees violates the constitutional rights of nonunion State employees. Enforcement of the indemnification clause would work against the important public policies contained in the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Prayer For Relief

WHEREFORE, Plaintiffs pray judgment, for themselves and the class they seek to represent, as follows:

A. For actual damages in the full amount of agency fees and/or union dues deducted from their wages prior to having been provided with all of the protections required by the Supreme Court in *Hudson*, plus interest, and nominal exemplary damages under 42 U.S.C. § 1983, for depriving the Nonmembers of their rights, privileges, and immunities secured by the Constitution of the United States;

B. For equitable relief, restitution of all agency fees and/or union dues taken from Plaintiffs and

members of the class Plaintiffs seek to represent, plus interest; or, alternatively, assuming *arguendo* that Defendant MSEA is entitled to collect any fees in light of its failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, award Plaintiffs and class members compensatory damages or restitution in the amount of the portion of the service fees unlawfully exacted from them, with interest, and such other amounts as principles of justice and compensation warrant;

C. For equitable relief, a preliminary and permanent injunction prohibiting Defendants from taking any action to demand or collect from Plaintiffs and class members, by any means, so-called "service fees," and from taking any other action to enforce the "Union Security" provisions of the State/MSEA memoranda of understanding, Exhibits A & B, until a constitutional agency fee procedure approved by this Court is established and operating, and a constitutionally-adequate agency fee notice approved by this Court is provided to the Nonmembers;

D. For equitable relief, a preliminary and permanent injunction prohibiting Defendants from taking any action to enforce and/or comply voluntarily with the indemnification sections of the "Union Security" articles of the State/MSEA collective bargaining agreements;

E. For issuance of a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring:

1. that Defendants have failed to comply with *Hudson*, *supra*, and thus, that the "Union Security" articles of the State/MSEA collective bargaining agreements are null and void on their face and/or

as applied to Plaintiffs and class members, because collection of and demand for payment of compulsory agency fees therefore violates the First, Fifth, and Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983;

2. that any money actually collected from any Nonmember by Defendants and those working in concert with them, under color of the collective bargaining agreements, was illegally collected in violation of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983; and

3. that the indemnification sections of the "Union Security" articles of the State/MSEA collective bargaining agreements are null and void as against public policy, and unenforceable and thus, that the "Union Security" articles of the State/MSEA collective bargaining agreements are null and void on their face.

F. For costs, including reasonable attorneys' fees under 42 U.S.C. § 1988; and

G. Such other and further relief as the Court may deem just and proper.

DATED: 8 August 2005

Respectfully submitted,

/s/ Stephen C. Whiting

STEPHEN C. WHITING, Esq.
The Whiting Law Firm, P.A.
75 Pearl Street, Suite 207
Portland, Maine 04101-4101
(207) 780-0681
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/s/ W. James Young

W. JAMES YOUNG, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
FACSIMILE — (703) 321-9319

ATTORNEYS FOR PLAINTIFFS

EXHIBIT D

[Filed 09/14/2005]

To: All Maine State Employees in the Administrative Services, Professional-Technical Services, Supervisory Services, or Operations, Maintenance & Support Services Bargaining Units Who Are Represented by MSEA-SEIU But Are Not Members of MSEA-SEIU

From: Maine State Employees Association, SEIU Local 1989

Re: Payment of Service Fees to MSEA-SEIU

Date: July 12, 2005

The Maine State Employees Association, SEIU Local 1989 ("MSEA-SEIU") is recognized by your employer as your exclusive representative for purposes of collective bargaining. As such, MSEA-SEIU has the legal duty to represent you fairly, in a manner consistent with law, and to provide you with certain information regarding your right to join or not join the union. If you do not join the union, you are obligated to pay a service or fair-share fee to MSEA-SEIU to cover the cost of collective bargaining and related activities, and you also have the right to challenge the amount of that fee, as initially determined by MSEA-SEIU, in a hearing before an impartial arbitrator. This memorandum and its attachments are being sent to you to provide you with notice of your rights and obligations. (This notice supplants any prior notices that you may have received from MSEA-SEIU on this subject.)

Records available at MSEA-SEIU indicate that you currently are not a member of the union. As noted, Maine State Employees in the Administrative Services, Professional & Technical, Supervisory Services, or Operations, Maintenance & Support bargaining units who choose not to join MSEA-SEIU are required to pay a service fee reflecting the employee's pro-rata share of those expenditures that are germane to the union's representational activities. Such employees also have the right to challenge the amount of that fee. Your individual obligations are defined by the Union Security article of the contract between MSEA-SEIU and the State of Maine. A copy of that entire article is attached to this memorandum (p. 30).

For the period from July 1, 2005 through July 31, 2006, nonmember employees who are obligated to pay a full service fee to MSEA-SEIU must pay a fee that is 49.13% of regular membership dues, beginning with the first payroll period after July 1, 2005. (For nonmember employees last hired prior to July 2, 2003, who have not been members of MSEA-SEIU or fee payers since that date, the fee is capped at fifty percent of the applicable fee amount until June 2006.) MSEA-SEIU dues are reduced for part-time employees, and are set each year by the delegates to the annual convention. Any change in the dues rate is effective January 1. Based on the current dues rate, the biweekly dues and service fee amounts in effect after July 1, 2005 are as follows:

BIWEEKLY DUES AND FEE RATES IN EFFECT JULY 1, 2005

	Full time (100%)	16-32 hours/week (60%)	less than 16 hours/week (30%)
Membership dues	18.20	10.92	5.46
Full fair share	8.94	5.36	2.68
50% fair share	4.47	2.68	1.34

MSEA-SEIU recalculates its service fee every year, based on updated financial information. In 2005, the recalculation has resulted in a reduction of the fee from the previous year, and is being implemented as of the first pay period after July 1, 2005 as a matter of administrative convenience to both employees and the union. That percentage will remain in effect through July 31, 2006, and will be recalculated annually thereafter. The actual dollar amount of the fee may change on January 1, 2006, if the MSEA-SEIU Annual Council changes the dues amount when it sets the 2006 budget in October. Nonmembers may choose to pay this fee in one of two ways: either through biweekly payroll deduction or by paying the fee directly to MSEA-SEIU on the same schedule. To pay the fee automatically through payroll deduction, you must have submitted a written payroll deduction authorization form to MSEA-SEIU by June 30, 2005, or, if you are a new hire, within 30 days of achieving permanent status. You will have the option to authorize payroll deduction in December or June of each year. To pay the fee directly to MSEA-SEIU through periodic payments made by check, you will have to send the appropriate amount to MSEA-SEIU within

ten days of the receipt of each paycheck. MSEA-SEIU will send you billing information shortly under separate cover. If you already have submitted a written payroll deduction authorization form, you do not have to send another copy; if you already have submitted a written payroll deduction authorization form and you want to terminate that authorization, you must provide written notice to MSEA-SEIU.

The basis for the service fee amount and the calculations upon which the fee is based are contained in this notice.

While we urge you to join this Union as a full member, you certainly are not required to do so. If you decide not to join, the union will continue to represent you both fairly and effectively. As noted above, nonmembers are required, as a condition of continued employment, to pay a fee reflecting the pro-rata costs of the union's expenditures that are germane to its representational activities. Nonmember employees who are obligated to pay a fee to MSEA-SEIU also may choose to challenge the amount of that fee, as initially determined by MSEA-SEIU, by filing a challenge to the amount of that fee. If you file a challenge to the amount of the fee, you will be given an opportunity to contest the amount of the fee during a hearing that will be held before an impartial arbitrator chosen by the American Arbitration Association. The selection of the impartial arbitrator and the conduct of the hearing will be governed by the American Arbitration Association's Rules for Impartial Determination of Union Fees. If you file a challenge to the amount of the fee, during the period that your challenge is pending you will be required to pay the fee, but the entire fee that you pay (either by payroll deduction or direct payment to MSEA-SEIU) will be

held in an interest-bearing escrow account. Once the hearing is completed and the arbitrator has rendered a decision, you then will be required to pay a fee equal to the amount determined by the impartial arbitrator. Also at that time, if the escrow account has accumulated any fees in excess of that amount, they will be returned to you, with interest. Your challenge to the amount of the fee must be in writing and must be signed, but other than your name and address, there is no particular information that you need to include when submitting your challenge. Your challenge must be mailed or delivered to the MSEA-SEIU at 65 State Street, Augusta, ME 04332. **To be timely and applicable for the service fee period running from July 1, 2005 through July 31, 2006, your written challenge must be received at the offices of MSEA-SEIU on or before Tuesday, August 16, 2005**. Since challenges were filed in June 2005, the Union has already initiated the arbitration procedure, and a hearing is scheduled on October 28, 2005 before Arbitrator Gary Altman. In order to participate in that hearing, please be certain that you mail or deliver your challenge to MSEA-SEIU on or before August 16, 2005. (If you previously submitted a challenge to the 2005-2006 service fee, you may, but do not need to submit an additional challenge.)

* * *

As noted, nonmembers are required to pay a fee reflecting the pro-rata costs of the union's expenditures that are germane to its representational activities. Those expenditures are referred to as "chargeable," while non-germane or ideological expenditures are described as "non-chargeable." The union calculates the fee based on its audited financial records for

the most recently available fiscal year, applying its best interpretation of the existing law. The resulting ratio is set forth in an attached verified statement from the MSEA-SEIU Finance Director (p. 8). Her expenditure calculations are, in turn, audited by independent accountants to ensure that the union's underlying financial records and audited statements support her calculations. The auditors' report also is attached (pp. 11, 12).

In dividing chargeable from non-chargeable expenditures, the union is required to rely on its analysis of the current law. In addition, at least with regard to monies expended by the Service Employees International Union (SEIU), MSEA-SEIU follows the legal guidelines applied by the SEIU in its audited Consolidated Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses—Alternative Basis of Allocation. A copy of this document for the year ended December 31, 2003—which is the most recently available fiscal year for SEIU—also is attached to this memorandum (p. 20). In all cases, the focus of the analysis is on the money spent by the union to do what it does. Generally speaking, when money is spent to do something representational, those costs may be charged to nonmember employees. If the union does something political or ideological, those costs cannot be charged. For purposes of this calculation, we treat our major categories of expenditures as follows:

- Collective bargaining and contract administration: Expenditures related to bargaining and the administration or enforcement of union contracts are considered fully chargeable. This includes costs involved in the research and development of contract proposals, selection of the bargaining

committees and their reimbursed expenses, communications with members about bargaining, the direct expenses of bargaining, and contract ratification. Once a contract is ratified, the union also spends money recruiting and training stewards and other representatives, and processing or arbitrating grievances.

- Communications and publicity: The union communicates with members and others through various means, including its newspaper, "The Stater." The costs of these activities may be legally chargeable or non-chargeable, depending on the content of the communication. For example, a single issue of the "Stater" may include articles on non-chargeable political matters and chargeable information for stewards concerning contract administration. The overall cost of publication may be divided accordingly. In its calculation, MSEA-SEIU treats essentially all of its communications as non-chargeable.

- Legal advice and litigation: Litigation or legal services related to the union's representational activities (i.e., grievances, collective bargaining rights, etc.) are legally chargeable. Other litigation is considered non-chargeable. MSEA-SEIU allocates legal expenditures based on cost centers, and determines chargeability by the activity involved. For example, if the General Counsel provides the union legal advice on campaign finance questions, he would report that work on a weekly basis as political work, and that portion of his time would be treated as non-chargeable.

- Training and education: The union trains its staff, members and activists in a variety of subjects, including steward skills, leadership, dispute reso-

lution, and political skills. The costs of training events may be allocated based on content. Training that helps the union maintain its effectiveness at the bargaining table or in grievances, such as bargaining skills or steward advocacy, may be considered chargeable. Trainings aimed at developing political skills or other ideological subjects are non-chargeable. In its calculation, MSEA-SEIU has treated steward and dispute resolution skills training as chargeable, and has treated other training activities as non-chargeable.

- Lobbying and politics: Although the law permits the union to charge for lobbying activities related to legislative approval of union contracts, MSEA-SEIU currently treats all lobbying and political expenditures as non-chargeable. This includes the costs of membership publications, staff time, or leadership expenses incurred in mobilizing or training members to engage in electoral work, as well as those direct campaign contributions that can be made from union funds. While the original audited statement of chargeable and non-chargeable expenses attached to this notice reflects $11 of political and lobbying expenditures as being chargeable, nonmembers are not charged for that amount in this fee.

- Membership benefits: Benefits available only to members are non-chargeable. These include the costs of certain discount programs. The Income Protection program is not funded through dues, but any costs to MSEA-SEIU associated with that program are reimbursed by the plan and are treated as non-chargeable.

- Union governance: Without member involvement and internal democracy, this union could not per-

form any of its representational activities. The costs of governing the union, including the convention, the Board of Directors, and chapter or local union meetings, directly support the representational goals of MSEA-SEIU and are therefore legally chargeable. In its calculations, however, MSEA-SEIU has treated all Board of Directors meetings, and all expenditures of its subordinate affiliated locals and chapters, as non-chargeable.

– Organizing: The Union's ability to deliver effective contracts depends on its ability to maintain and extend its influence in all the job markets that affect its members. For this reason, the union invests in organizing new bargaining units and recruiting new members within existing units. These expenditures substantially improve the union's bargaining and representational efforts, and are critical to the long-term protection of our members' wages and benefits. While MSEA-SEIU believes strongly that its organizing expenditures are legally chargeable, it has decided to treat these expenditures as non-chargeable. (Note: Attached to this memorandum is MSEA-SEIU's Audited Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses and Supporting Documents as of December 31, 2004 [p. 12]. In that statement, the auditors treated organizing expenses of both MSEA-SEIU and SEIU as fully chargeable. MSEA-SEIU has reduced the amount of its service fee, however, by treating all organizing expenses as non-chargeable for purposes of determining the amount of the service fee included in this notice. Thus, the total amount of $257,745 that is listed under "Total chargeable expenses" for "Organizing," as well as $640,424 of the total amount of $925,481 that is

listed under "Total chargeable expenses" for "Affiliation," are now being treated as non-chargeable expenditures by MSEA-SEIU in determining the amount of the service fee. A revised schedule, reviewed by the auditor, is included with this notice [pp. 10, 11].)

- Personnel Costs: Personnel costs consist of salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses. With the exception of certain promotional costs paid to staff, personnel costs are considered to be fully chargeable for the following categories of activities: stewards, field representatives, grievance arbitration, legal services related to contract administration, negotiation, and union governance. Personnel costs of the financial and administrative departments have been allocated based on determinations made by individual employees as to the percentage of time they spend on chargeable or non-chargeable activities. Personnel costs for organizing and political activities are treated as non-chargeable. In this calculation, all personnel costs are determined by referring to weekly time sheets and expense vouchers that record the dollars spent, and hours or percentage of time devoted, to specific activity centers. Those contemporaneous records are audited by the independent auditor.

- Professional Fees and Expenses: All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services performed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the service performed by the

consultant. Chargeable activities include expenses for training, speakers, and research involving otherwise chargeable matters. Professional fees for consulting services in connection with political activities and legislative activities are treated as non-chargeable.

- Administrative Expenses: Administrative expenses include items such as rent and utilities, office supplies and expenses, investment expenses, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are treated as chargeable or non-chargeable based on the same ratio as personnel costs.
- Affiliation: MSEA-SEIU pays per capita affiliation fees to the SEIU and to the AFL-CIO. SEIU performs its own analysis of its chargeable and non-chargeable expenditures, set forth in its audited Consolidated Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses—Alternative Basis of Allocation, a copy of which is attached to this memorandum. MSEA-SEIU applies that analysis to its per capita payments to SEIU. Payments to the AFL-CIO are treated as non-chargeable.
- Contributions: Contributions for charitable, civic, and labor-related purposes are considered to be fully non-chargeable.

As noted above, MSEA-SEIU applies these principles to distinguish chargeable from non-chargeable expenditures, as reflected in its audited financial records. The union tracks the costs associated with those activities in functional departments or categories. For

the purpose of this analysis, these activities have been grouped in the following categories: membership services, political and lobbying activities, affiliation, governance, finance and administration, or other. These departments implement the programs of MSEA-SEIU and provide services to the employees it represents. That analysis is set forth in an affidavit from the union's Finance Director, with an attachment showing the figures she derived from the audited records (p. 8). Her work was verified by an independent auditor, whose findings also are attached (pp. 11, 12).

To repeat, if you wish to challenge the amount of the fee, please notify MSEA-SEIU of your challenge, in writing, **on or before August 16, 2005**. Your entire fee payment will be placed in an interest bearing escrow account pending resolution of the challenge. You will be required to pay the full amount of the fee to the union on a timely basis pending resolution of the challenge. The union will then submit the dispute for resolution through the American Arbitration Association. Consistent with the AAA rules, the union will bear the costs of the arbitrator's fees, as well as the administrative costs charged by the AAA. If the dispute is resolved in your favor, you will be reimbursed the appropriate amount, plus any interest accrued from the escrow account. All amounts found by the impartial arbitrator to be properly chargeable by MSEA-SEIU will be released from the escrow account to the union.

Thank you for your attention to these important matters.

AFFIDAVIT OF JOAN TOWLE

I, Joan Towle, being of full age and duly sworn according to law, do hereby state and depose that:

1. I am employed by the Maine State Employees Association, SEIU Local 1989, as its Director of Finances.

2. In that capacity, I calculated the percentage of the union's expenditures that are germane to collective bargaining, based on the union's audited financial statements for the year 2004, and on the guidelines set forth in the attached memorandum.

3. Based on those calculations, I determined that 49.13 % of the union's expenditures are chargeable to fair share or agency fee payers. Because the current full-time dues rate is $9.10 per week, a full-time service or fair share fee payer will owe the union $8.94 per biweekly payroll period. Employees required to pay 50% of the fair share rate will be required to pay $4.47 per bi-weekly pay period.

4. I based my calculations initially on expense sheets and other contemporaneous records. MSEA-SEIU tracks expenses according to the following specific cost centers: general union administration, representational services, general membership services, publications/media relations, organizing (external), organizing (internal), political activities, legislative activities and other. Some of these cost centers include further subcategories. For each of these cost centers, I examined total personnel costs, including payroll, employer payroll taxes, fringe benefits, travel and other reimbursed business expenses. Based on that analysis, I determined the following:

a. General union administration: This cost center generally includes tracking and managing union finances, payroll, paying bills, and other related administrative matters. Expenses related to this cost center were treated as chargeable or nonchargeable depending on the specific administrative activity performed.

b. Representational Services: Expenses related to staff promotional accounts were deemed to be non-chargeable. Since this cost center covers most of the collective bargaining and grievance handling activities, the vast majority of these expenditures are chargeable. Steward training was considered chargeable, but all other member training was treated as non-chargeable.

c. General membership services: All expenditures for membership benefits were deemed non-chargeable. Union governance was divided between chargeable and non-chargeable expenses. For example, directors' expenses and chapter allotments were deemed non-chargeable. Convention expenses were treated as fully chargeable.

d. Publications/Media relations: All but four dollars of these expenses were treated as non-chargeable. That expenditure did not affect the final results of these calculations.

e. Organizing (both internal and external): These expenses were treated as fully non-chargeable.

f. Political and legislative activities: All but eleven dollars of these expenses were treated as non-chargeable. That expenditure did not affect the final results of these calculations.

g. Affiliation expenses: Payments to the SEIU were allocated in accordance with the SEIU's own statement of chargeable and non-chargeable expenses, set out in SEIU's audited Consolidated Statement of Expenses and Allocation between Chargeable and Non-Chargeable Expenses—Alternative Basis of Allocation. All payments to the AFL-CIO were treated as non-chargeable.

h. Local chapter payments: All payments to MSEA-SEIU's locals and chapters were treated as non-chargeable.

5. I then allocated furniture and equipment depreciation expenses and operating overhead to the various cost centers, using the chargeability ratios derived from total personnel costs.

6. Since the issuance of the independent auditor's report by the certified public accounting firm of Runyon Kersteen Ouellette, I have re-calculated allocations of expenditures based on the chargeability ratio of personnel costs, other related expenses, and affiliation expenditures derived when treating organizing as entirely non-chargeable. These calculations are summarized on the attached document titled "Revised Statement of Expenses and Allocations Between Chargeable and Non-Chargeable Expenses," which applies the re-calculations described in this paragraph to the Statement of Expenses and Allocations Between Chargeable and Non-Chargeable Expenses" that can be found in the auditor's report.

I have read the foregoing affidavit and swear that it is true,

7/11/05 /s/ Joan Towle
Date Joan Towle

State of Maine
Kennebec, ss.

Appeared before me the above Joan Towle on this date and made oath that the above affidavit is true based on her personal knowledge,

7/11/05 /s/ Illegible
Date Notary Public
My Commission expires on: 6-18-08

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MAINE STATE EMPLOYEES ASSOCIATION
Revised
Statement of Expenses and Allocation Between
Chargeable Expenses and Non-Chargeable Expenses With Organizing as Non-Chargeable
December 31, 2004

		Expenses per audited financial statements	Allocations: Allocation of overhead based on personnel	Allocation of benefits based on personnel	Add back depreciation based on personnel	Total expenses with allocations	Less Current Year Vacation Accrual	Less non-allocable expenses	Total expenses net of non-allocable expenses	Non-chargeable expenses	Total chargeable expenses
Membership services											
General membership services	$	207,004	5,158	214	587	212,963	748	(71,233) a	142,478	95,006	47,472
Grievance arbitration		63,400	-	-	-	63,400	-	-	63,400	-	63,400
Legal services		73,493	5,274	219	601	79,587	(330)	-	79,257	83	79,174
Negotiation		124,118	11,144	461	1,268	136,991	2,902	-	139,893	71	139,822
Stewardship		30,186	611	25	70	30,892	(425)	-	30,467	-	30,467
Public and media relations		86,642	7,255	301	825	95,023	(315)	-	94,708	94,704	4
Organizing		229,495	23,213	962	2,641	256,311	2,022	-	258,333	258,333	-
Field representatives		669,941	76,332	3,165	8,685	758,123	(1,202)	-	756,921	1,625	755,296
Total membership services		1,484,279	128,987	5,347	14,677	1,633,290	3,400	(71,233)	1,565,457	449,822	1,115,635
Political and lobbying activities		406,746	23,900	991	2,719	434,356	(5,751)	-	428,605	428,594	11
Fight for the future campaign		161,452	175	7	20	161,654	(111)	(161,543) b	-	-	-
Affiliation		1,269,247	-	-	-	1,269,247		-	1,269,247	984,190	285,057
Finance and administration		756,138	(166,337)	(7,410)	5,829	588,220	(8,417)	(121,097) c	458,706	65,813	392,893
Governance		397,836	13,226	548	1,505	413,115	7,340	-	420,455	160,341	260,114
Other		38,785	49	517	1,417	41,768	417	-	42,185	39,792	2,393
Depreciation expense		26,167	-	-	(26,167)	-		-	-	-	-
Total expenses	$	4,541,650	-	-	-	4,541,650	(3,122)	(353,873)	4,186,655	2,128,553	2,056,103
						100.8008%				50.87%	49.13%

a Non-allocable reimbursed expenses
b Non-allocable expenses related to the "Fight for the Future Campaign"
c Non-allocable income protection plan expenses

Runyon
Kersteen
Ouellette
[LOGO]

Certified Public Accountants
and Business Consultants

July 7, 2005

Tim Belcher, Executive Director
Maine State Employees Association
65 State Street
Augusta, Maine 04330

Mr. Belcher:

As you know, we have audited the financial statements of the Maine State Employees Association and its Affiliates, for the year ended December 31, 2004; and have issued our report thereon dated April 7, 2005. We have also audited the *Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses* of the Maine State Employees Association for the year ended December 31, 2004, and issued our report dated May 17, 2005.

The *Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses* of the Maine State Employees Association was based on definitions and significant factors and assumptions which were described in the footnotes of that report. The total expenses reflected in the first column of the audited statement agree to the expenses in the audited financial statements of the Maine State Employees Association for the year ended December 31, 2004. Subsequent to the issuance of our report on the *Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses*, the Association has elected to re-interpret the assumptions and factors previously described in

the notes. Specifically, the Association has decided to recalculate their chargeable and non-chargeable expenses to treat organizing expenditures as entirely non-chargeable. Previously, the Association had elected to treat organizing costs as chargeable.

At the time the report was issued, the assumptions used had been the representations of the Association. Since that time, revised assumptions by management have resulted in a change in the Association's treatment of these specific costs.

We understand the Association has re-calculated its percentage of chargeable vs. non-chargeable expenses based on this new treatment of organizing costs and this resulted in the chargeable rate dropping from 70.60% to a rate of 49.13%. The revised schedules, prepared by management, are consistent with the original audited schedules in that the total expenses reflected in the revised statement agree to the expenses in the audited financial statements of the Maine State Employees Association for the year ended December 31, 2004.

We would recommend that you provide your revised schedules along with a copy of this letter to anyone who is in receipt of the original reports which included our audit report dated May 17, 2005.

Very truly yours,

RUNYON KERSTEEN OUELLETTE

/s/ Kathleen Tyson
Kathleen Tyson, Partner

MAINE STATE EMPLOYEES ASSOCIATION

Audited Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses And Supporting Documents

December 31, 2004

MAINE STATE EMPLOYEES ASSOCIATION

Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses December 31, 2004

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Runyon
Kersteen
Ouellette
[LOGO]

Certified Public Accountants
and Business Consultants

Independent Auditor's Report

Board of Directors
Maine State Employees Association
Augusta, Maine

We have audited, in accordance with auditing standards generally accepted in the United States of America, the financial statements of the Maine State Employees Association and its Affiliates, for the year ended December 31, 2004, and have issued our report thereon dated April 7, 2005. We have also audited the accompanying statement of expenses and allocation between chargeable expenses and non-chargeable expenses of the Maine State Employees Association for the year ended December 31, 2004. This statement is the responsibility of Maine State Employees Association's management. Our responsibility is to express an opinion on this statement based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the statement is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the statement. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall statement presentation. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in the first column of the statement agree to the expenses in the audited financial statements of the Maine State Employees Association for the year ended December 31, 2004. The allocation of expenses between chargeable and non-chargeable is based on the definitions and significant factors and assumptions described in the footnotes.

In our opinion, the statement referred to above presents fairly, in all material respects, the statement of expenses of the Maine State Employee Association for the year ended December 31, 2004, and the allocated expenses between chargeable and non-chargeable expenses, on the basis of definitions and significant factors and assumptions described in the footnotes, and is not intended to be pre entation in conformity with accounting principles generally accepted in the United States of America.

This report is intended solely for the information and use of the Board of Directors and management of the Maine State Employees Association and its Affiliates, and is not intended to be and should not be used by anyone other than these specified parties.

/s/ Runyon Kersteen Ouellette

May 17, 2005
South Portland, Maine

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MAINE STATE EMPLOYERS ASSOCIATION
Statement of Expenses and Allocation Between
Chargeable Expenses and Non-Chargeable Expenses
December 31, 2004

		Allocations								
	Expenses per audited financial statements	Allocation of overhead based on personnel	Allocation of benefits based on personnel	Add back depreciation based on personnel	Total expenses with allocations	Less current year vacation accrual	Less non-allocable expenses	Total expenses net of non-allocable expenses	Non-chargeable expenses	Total chargeable expenses
Membership services										
General membership services	$ 207,004	5,158	214	587	212,963	748	(71,233) a	142,478	95,006	47,472
Grievance arbitration	63,400	-	-	-	63,400	-	-	63,400	-	63,400
Legal services	73,493	5,274	219	601	79,587	(330)	-	79,257	83	79,174
Negotiation	124,118	11,144	461	1,268	136,991	2,902	-	139,893	71	139,822
Stewardship	30,186	611	25	70	30,892	(425)	-	30,467	-	30,467
Public and media relations	86,642	7,255	301	825	95,023	(315)	-	94,708	94,704	4
Organizing	229,495	23,213	962	2,641	256,311	2,022	-	258,333	588	257,745
Field representatives	669,941	76,332	3,165	8,685	758,123	(1,202)	-	756,921	1,625	755,296
Total membership services	1,484,279	128,987	5,347	14,677	1,633,290	3,400	(71,233)	1,565,457	192,077	1,373,380
Political and lobbying activities	406,746	23,900	991	2,719	434,356	(5,751)	-	428,605	428,594	11
Fight for the Future Campaign	161,453	175	7	20	161,654	(111)	(161,543) b	-	-	-
Affiliations	1,269,247	-	-	-	1,269,247		-	1,269,247	343,766	925,481
Finance and administration	756,138	(166,337)	(7,410)	5,829	588,220	(8,417)	(121,097) c	458,706	65,813	392,893
Governance	397,836	13,226	548	1,505	413,115	7,340	-	420,455	160,341	260,114
Other	39,785	49	517	1,417	41,768	417	-	42,185	39,792	2,393
Depreciation expense	26,167	-	-	(26,167)	-		-	-	-	-
Total expenses	$ 4,541,659	-	-	-	4,541,659	(3,122)	(353,873)	4,184,655	1,230,383	2,954,272
					100.0000%				29.48%	70.60%

See accompanying auditor's report and notes to statement.

a Non-allocable reimbursed expenses
b Non-allocable expenses related to the "Fight for the Future Campaign"
c Non-allocable income protection plan expenses

MAINE STATE EMPLOYEES ASSOCIATION
Notes to Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses

NATURE OF OPERATIONS AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Nature of Operations - The Maine State Employees Association (MSEA) is a nonprofit labor organization whose purpose is to promote goodwill and fellowship and to negotiate the advancement of career employment privileges and benefits to the betterment of all employees of the State of Maine or other employers with which MSEA has, or is seeking to establish, a collective bargaining relationship. It serves as the local Maine chapter of the national Service Employees International Union (SEIU).

Income Tax Exemption - Maine State Employees Association has been granted exemption from federal income tax under Section 501(c)(5) of the Internal Revenue Code. MSEA has been classified by the Internal Revenue Service not to be a private foundation.

Basis of Accounting - MSEA prepares their statement of expenses in accordance with accounting principles generally accepted in the United States of America, which involves the application of accrual accounting.

Basis of Presentation - The accompanying statement of expenses and allocation between chargeable expenses and non-chargeable expenses was prepared for the purpose of determining the fair share cost of services rendered by the Maine State Employees Association for employees represented by, but not

members of, the Maine State Employees Association. This statement is not intended to be a complete presentation of MSEA's financial position, or changes in its net asset and its cash flows in accordance with accounting principles generally accepted in the United States of America.

DEFINITIONS

The following definitions of chargeable and non-chargeable expenses are based on existing law and MSEA's interpretation of court cases.

Chargeable expenses - Chargeable expenses are those incurred by MSEA that reflect the share of the costs of operations of MSEA, which are considered necessary and reasonable in representing employees in their dealings with employers on labor management issues. Such costs of operations include: negotiating and administering the collective bargaining-contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the union as representative of the employees in the bargaining unit; and the maintenance of MSEA's existence. The following are examples of expenditures classified as chargeable:

- Preparation for and negotiations of collective bargaining agreements.
- Contract administration, including investigating and processing grievances.
- Meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work-related subjects and issues.

- Handling problems of employees related to collective bargaining.
- Communications with community organizations, civic groups, government agencies and the media regarding MSEA's position on matters relating to collective bargaining.
- Organizing new members or bargaining units.
- Providing legal, economic, and technical expertise on behalf of employees in matters related to collective bargaining.

Non-chargeable expenses - Non-chargeable expenses are those expenses incurred by MSEA for the benefit and advancement of represented employees and their union which are not considered representational activities for non-members. Non-chargeable activities include those services that are ideological or political in nature; those that are exclusively for the benefit of full union members; and those that otherwise are not considered germane to representing non-members in the collective bargaining process. Activities that are classified as non-chargeable include the following:

- Legislative and government activities outside the limited context of contract ratification or implementation.
- Public relations and other efforts directed towards functional activities that are not considered germane to representing non-members in the collective bargaining process.
- Political activity expenses at either the federal, state, or local level.
- Union publications to the extent they report on non-administrative or non-representational activities.

- Donations and per capita tax fees paid to affiliated labor organizations, to the extent that those organizations expend those funds for non-chargeable activities.
- Cost of benefits that are not available to non-members.

FUNCTIONAL DEPARTMENTS OF THE MAINE STATE EMPLOYEES ASSOCIATION

MSEA tracks all personnel activities and expenditures through cost centers or functional departments in one of the following areas: membership services, political and lobbying activities, affiliation, governance, finance and administration, or other. These cost centers reflect the activities and expenditures of MSEA in providing services to employees of the State of Maine or other employers with which MSEA has, or is seeking to establish, a collective bargaining relationship.

Membership Services - Membership services include all contract enforcement and contract negotiation departments such as stewardship, field representatives, grievance arbitration, legal services, negotiation, organizing, publications and media relations, and general membership services. The cost center of membership services reflects expenditures involved in negotiating, administering, and enforcing collective bargaining contracts, settling grievances either through arbitration or legal proceedings, and dealing with a variety of issues effecting both members and non-members of the union within the scope of the union's role as exclusive bargaining agent.

Political and Lobbying Activities - This cost center relates entirely to political and legislative

activities, including those expenditures from union funds paid to political candidates that are permitted by law. The political and lobbying activities represent MSEA's costs associated with staffing its lobbying efforts and the various committee expenses that accompany those efforts.

Affiliation - Affiliation is the cost center that tracks all per capita tax and subsidy payments to such affiliated labor organizations as the Maine AFL-CIO and the national Service Employees International Union.

Governance - Governance includes all expenses for service to local chapters, attending meetings or conventions of the MSEA or affiliated organizations, and the expenses related to the MSEA's Board of Directors.

Finance, Administration, and Other - This cost center tracks the general operating costs of the MSEA and includes such items as rent and utilities, office supplies and expenses, printing, postage, telephone, insurance, and other similar types of expenses.

SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE

Personnel Costs - Personnel costs consist of salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses. With the exception of certain promotional costs paid to staff, personnel costs are considered to be fully chargeable for the following departments: grievance arbitration, legal services, negotiation, stewardship, organizing, field

representatives, and governance. Personnel costs of the financial and administrative departments have been allocated based on determinations made by individual employees as to the percentage of time he or she spends on chargeable or non-chargeable activities.

Professional Fees and Expenses - All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services performed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the service performed by the consultant. Chargeable activities include expenses for training, speakers, and research matters. Professional fees for consulting services in connection with political activities and legislative activities are considered to be fully non-chargeable.

Administrative Expenses - As mentioned earlier, administrative expenses include items such as rent and utilities, office supplies and expenses, investment expenses, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

Contributions - Contributions for charitable, civic, and labor-related purposes are not directly related to the function of representation and are considered to be fully non-chargeable.

Political and Lobbying Activities - Political and lobbying activities related entirely to political and legislative activities are considered to be fully non-chargeable.

Conferences and Meetings - Expenses for conferences and meetings are allocated between chargeable expenses and non-chargeable expenses based on the purpose of and topics discussed at the meetings. Items of a political or legislative nature are considered to be non-chargeable. Educational training programs and conferences for local, state, and national staff, which are to enhance skills in collective bargaining, grievance handling, and contract administration, are considered fully chargeable since they pertain to matters which are germane to collective bargaining. Executive Board meetings and meetings which pertain to the governance of MSEA such as formulating and communicating union policy are considered to be fully chargeable.

Public and Media Relations - Direct printing and publishing expenses of publications are allocated based on the specific content of articles in the publications. Expenses allocable to articles considered to be political or ideological in nature are deemed not to benefit non-members and are considered to be non-chargeable. Expenses allocable to reporting on legislative and lobbying activities, litigation activities, illegal strike activities, and articles relating to enhancing the reputation of MSEA as a whole are considered to be non-chargeable. The content of articles deemed chargeable is directly related to issues on organizing, collective bargaining, contract administration, and grievance matters. These articles include topics such as collective bargaining contracts negotiated by, and arbitrations won by MSEA.

Promotional Expenses - Promotional expenses are incurred for the purpose of promoting the reputation of MSEA. These items do not directly benefit the employees under collective bargaining agreements and are considered to be fully non-chargeable.

Special Projects - Special projects are considered to be chargeable or non-chargeable based on an analysis of the nature of the special project conducted.

Affiliation Fees and Assessments - Per capita taxes and assessments paid to the AFL-CIO and affiliated labor organizations are considered to be fully non-chargeable. Per capita taxes and assessments paid to the national SEIU are allocated, based on the most recent "Audited Consolidated. Statements of Expenses and Allocation between Chargeable and Non-Chargeable Expenses" issued by that organization.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC
UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES ALTERNATIVE BASIS OF ALLOCATION

DECEMBER 31, 2003

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC
UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES ALTERNATIVE BASIS OF ALLOCATION

DECEMBER 31, 2003

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CERTIFIED PUBLIC ACCOUNTANTS

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Independent Auditor's Report

The Executive Board of the
Service Employees International Union,
AFL-CIO, CLC

We have audited the accompanying consolidated statement of expenses and allocation between chargeable expenses and non-chargeable expenses alternative basis of allocation of the Service Employees International Union, AFL-CIO, CLC - United States Division (the International Union) for the year ended December 31, 2003. This consolidated statement is the responsibility of the International Union's management. Our responsibility is to express an opinion on this consolidated statement based on our audit. We did not audit the total expenses reflected in Column A of the consolidated financial statements. Total expenses were audited by other auditors whose report has been furnished to us, and our opinion, insofar as it relates to the amounts in Column A, is based solely on the report of the other auditors.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the consolidated statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the statement. An audit also includes

assessing the accounting principles used and significant estimates made by the International Union's management, as well as evaluating the overall presentation of the consolidated statement. We believe that our audit provides a reasonable basis for our opinion.

The total expenses reflected in Column A of the consolidated statement agree to the expenses in the audited consolidated financial statement of the International Union for the year ended December 31, 2003, as modified to remove from expenses the per capita tax rebates paid to local unions of $10,204,666, political expenses paid from voluntary contributions of $2,349,224 and expenses associated with the Eastern and Western Conferences amounting to $326,875, which were paid from funds transferred upon the dissolution of the Eastern Conference affiliate. The allocation of expenses between chargeable (Column B) and non-chargeable (Column C) is based on the definitions and significant factors and assumptions described in Notes 2 and 3.

In our opinion, the consolidated statement referred to above present fairly, in all material respects, the consolidated expenses of the Service Employees International Union, AFL-CIO, CLC - United States Division for the year ended December 31, 2003, modified as discussed in the preceding paragraph and the allocated consolidated expenses between chargeable and non-chargeable expenses, on the basis of the definitions and significant factors and assumptions described in Notes 2 and 3.

This report is intended solely for the information and use of the Service Employees International Union, AFL-CIO, CLC and its agency fee payers and is not

intended to be and should not be used by anyone other than those specified parties.

October 29, 2004

SERVICE EMPLOYEES INTERNATIONALUNION, AFL-CIO, CLC
UNITED STATES DIVISION

CONSOLIDATED STATEMENT OF EXPENSE AND
ALLOCATION BETWEEN CHARGEABLE
EXPENSES AND NON-CHARGEABLE EXPENSES
ALTERNATIVE BASIS OF ALLOCATION

YEAR ENDED DECEMBER 31, 2003

	Column A Total Expenses	Column B Chargeable Expenses	Column C Non-Chargeable Expenses	Notes
GENERAL FUND				
Personnel costs				
Organizing	$ 25,070,290	$ -	$ 25,070,290	3a
Organizing campaign support	10,970,866	8,838,146	2,132,720	3a
Politics, government, and community	2,453,781	-	2,453,781	3a
Union communications	5,084,529	2,476,316	2,608,213	3a
Leader support	6,714,624	5,954,967	759,657	3a
Administrative and financial services	4,457,970	3,351,788	1,106,182	3a
Professional fees and expenses	8,669,044	4,819,767	3,849,277	3b
Administrative expenses	9,634,164	3,608,958	6,025,206	3c
Contributions	2,111,182	-	2,111,182	3d
Payments to locals				
Subsidies	6,613,612	-	6,613,612	3e
Per capita tax rebates	10,204,666	10,204,666	-	3e
Reimbursements	985,772	985,772	-	3e
Political subsidies	1,493,105	-	1,493,105	3f
Conferences and meetings	3,664,698	649,751	3,014,947	3g
Communications and media	867,241	424,948	442,293	3h
Special projects	(5,165)	(5,165)	-	3i
Affiliation fees and assessments	10,004,911	-	10,004,911	3j
Death gratuities	122,633	-	122,633	3k
Building expenses	3,793,165	1,420,920	2,372,245	3l
Member telephone calls and visibility	799,888	-	799,888	3m
State Council return	776,114	776,114	-	3n
Total General Fund	114,487,090	43,506,948	70,980,142	
STRIKE AND DEFENSE FUNDS	6,435,572	6,435,572	-	3o
POLITICAL EDUCATION AND ACTION FUNDS	7,784,055	-	7,784,055	3p
COMMITTEE ON POLITICAL EDUCATION	2,349,224	-	2,349,224	3p
UNITY FUND	43,400,147	-	43,400,147	3q
CONVENTION FUND	155,488	155,488	-	3r
LEGAL DEFENSE FUND	29,945	-	29,945	3s
CONFERENCE FUND EXPENSES	328,875	328,875	-	3t
Total expenses before modification	174,978,376	50,424,883	124,553,513	
LESS				
Per capita tax rebate payments to locals	(10,204,666)	(10,204,666)	-	
Political expenses paid from voluntary contributions	(2,349,224)	-	(2,349,224)	
Conference Fund expenses	(328,875)	(328,875)	-	
Total expenses, as modified	$ 162,097,611	$ 39,893,322	$ 122,204,289	
	100%	24.61%	75.39%	

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC
UNITED STATES DIVISION
NOTES TO CONSOLIDATED STATEMENT OF EXPENSES AND ALLOCATION BETWEEN CHARGEABLE EXPENSES AND NON-CHARGEABLE EXPENSES - ALTERNATIVE BASIS OF ALLOCATION
DECEMBER 31, 2003

NOTE 1 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Method of Accounting - The financial statement has been prepared on the accrual basis of accounting in accordance with generally accepted accounting principles.

Basis of Presentation - The accompanying consolidated statement of expenses and allocation between chargeable expenses and non-chargeable expenses was prepared for the purpose of determining the fair share cost of services rendered by the Service Employees International Union, ALF-CIO - United States Division (the International Union) for employees represented by, but not members of, the International Union and its affiliated local unions. This statement is not intended to be a complete presentation of the International Union's financial position, or changes in its net assets and its cash flows in accordance with generally accepted accounting principles. Under the alternative basis of allocation, which has been required by certain jurisdictions, organizing expenses are to be considered to be non-chargeable.

Financial Statement Presentation and Principles of Consolidation - The International Union records its transactions in various funds, each a self-balancing group of accounts. Each fund reflects only those transactions applicable to its designated functional area. The following fund designations are established by the International Union's Constitution or determined by management:

General Fund - Records all activity not accounted for in the other funds and includes the general operations of the International Union - U.S. Division and the operations of 1313 L Street, N. W., Inc. (1313 L Street), a not-for-profit corporation formed to be a title holding corporation for the International Union's headquarters building. The General Fund includes the consolidated accounts of 1313 L Street. All significant intercompany account balances have been eliminated in consolidation.

Strike and Defense Funds - Established to financially assist local unions and members involved in strikes. In accordance with the International Union's constitution, local unions may withdraw their per capita payments from the Strike and Defense Local Fund after one year of making per capita payments.

Political Education and Action Funds (PEA) - Records all activities for political education and political action disbursed from per capita tax allocations.

Committee on Political Education - Records all activities for political contributions disbursed from net assets received with donor imposed restrictions.

Unity Fund - The Unity Fund is a segregated fund financed from local union per capita payments that is used to finance Abreakthrough@ campaigns, coordinated bargaining, and other activities designed to increase density in SEIU's core industries. The Unity Fund is divided among the Building Service, Health Care, and Public Services Divisions and a discretionary fund.

Convention Fund - Records all activities for the convention of the International Union which meets every four years.

Other Funds - Established to account for assets which have been internally segregated for specific purposes as determined by the Executive Board.

Depreciation and Amortization - Depreciation and amortization of property, equipment, and improvements are computed over the estimated lives of the respective assets using the straight-line method.

Tax Status - The International Union is exempt from federal income taxes, except on net income, if any, from unrelated business activities, under Section 501(c)(5) of the Internal Revenue Code. 1313 L Street is exempt from income tax, except on net income, if any, from unrelated business activities, under Section 501(0(2) of the Internal Revenue Code.

NOTE 2 - DEFINITIONS

The following definitions of chargeable and non-chargeable expenses are based on existing law

and the International Union's interpretation of court cases.

a. Chargeable Expenses - Chargeable expenses are those incurred by the International Union that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the local union or council as representative of the employees in the bargaining unit, and the maintenance of the International Union's, local unions' and councils' existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of collective bargaining agreements; contract administration including investigating and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work-related subjects and issues; handling work-related problems of employees; and providing legal, economic, and technical expertise on behalf of employees in all work-related matters.

b. Non-Chargeable Expenses - Non-chargeable expenses are those expenses incurred by the International Union for the benefit and advancement of represented employees and their union which are not considered representational activities for non-members. Non-chargeable activities include those services that are ideological or political in nature; those that are exclusively for the benefit of full union members; and those that otherwise are not considered germane to the collective bargaining process.

Activities that are classified as non-chargeable include the following: organizing; legislative and government activities outside the limited context of contract ratification or implementation; public relations and other efforts directed towards functional activities that are not considered germane to representing non-members in the collective bargaining process; political activity expenses which include support at the Federal, state, or local level; union publications to the extent they report on non-administrative or non-representational activities; donations; affiliation fees paid to a labor organization; and the cost of benefits that are not available to non-members.

NOTE 3 - SIGNIFICANT FACTORS AND ASSUMPTIONS USED IN THE ALLOCATION OF CONSOLIDATED EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE

a. Personnel Costs - The International Union has assigned all personnel to either program,

leader support, or administrative and financial services departments. Program departments implement the programs of the International Union and provide services to affiliates and local unions. Administrative and financial services departments include the following departments: Accounting, Human Resources, Information and Technology, Meetings and Convention, Member Services, and Finance and General Administration. Leader support includes the Executive Department, the Executive Board, and the Firemen and Oilers Department. Personnel costs include salaries and wages, fringe benefits, payroll taxes, and reimbursed employee expenses.

Personnel costs of the organizing departments, field operations and campaign support departments, politics, government, and community departments, Union communications departments, leader support departments and the administrative and financial services departments have been allocated based on determinations made by the various department heads as to the percentage of time his or her department spends on chargeable and non-chargeable activities. The personnel costs of office and clerical personnel are allocated between chargeable and non-chargeable in the same percentage as their supervisors.

b. Professional Fees and Expenses - All professional fees and expenses for outside legal counsel are considered to be chargeable or non-chargeable based on the services per-

formed. Accounting and auditing fees and expenses are considered to be fully chargeable. Other professional fees and expenses are considered to be chargeable or non-chargeable based on the service performed by the consultant. Chargeable activities include expenses for training, speakers, and research matters. Professional fees for consulting services in connection with organizing campaigns, political activities and legislative activities are considered to be fully non-chargeable.

c. Administrative Expenses - Administrative expenses include items such as rent and utilities, office supplies and expenses, investment charges, equipment rental and maintenance, computer expenses, other taxes, depreciation and amortization, printing, postage, telephone, subscriptions, insurance, and bad debt expense. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

d. Contributions - Contributions for charitable, civic, and labor-related purposes are not directly related to the function of representation and are considered to be fully non-chargeable.

e. Payments to Locals - Payments to locals which represent subsidies for organizing are considered to be fully non-chargeable. Payments to locals which represent reimbursements for operating expenses are considered to be fully chargeable. The total expenses as reported in the audited consoli-

dated financial statement have been modified to remove from expenses the per capita tax rebates paid to local unions.

f. Political Subsidies - Political subsidies are considered to be fully non-chargeable.

g. Conferences and Meetings - Expenses for conferences and meetings are allocated between chargeable expenses and non-chargeable expenses based on the purpose of and topics discussed at the meetings. Items of a political, legislative, or organizing nature are considered to be non-chargeable. Educational training programs and conferences for local, state, and national staff, which are to enhance skills in collective bargaining, grievance handling, and contract administration are considered to be fully chargeable since they pertain to matters which are germane to collective bargaining. Executive Board meetings and meetings which pertain to the governance of the International Union such as formulating and communicating union internal policy are considered to be fully chargeable.

h. Communications and Media - Direct printing and publishing expenses of the publications are allocated based on the specific content of articles in the publications such as the International Union's magazine, SEIU Action, which is distributed to all members and agency fee payers and the newsletter, Bold Action Fax. Expenses allocable to articles considered to be political or ideological in nature are considered non-chargeable. Expenses allocable to reporting on legislative

and lobbying activities, litigation activities, illegal strike activities, organizing and articles relating to enhancement of the reputation of the International Union as a whole are considered to be non-chargeable. The content of articles deemed chargeable are directly related to issues on collective bargaining and contract administration. These articles include topics such as collective bargaining contracts negotiated by locals throughout the country. The expenses relating to the maintenance of the International Unions website have been allocated based on an assessment of the content included on the website throughout the year.

i. Special Projects - Special projects are considered to be chargeable or non-chargeable based on an analysis of the nature of the special project conducted.

j. Affiliation Fees and Assessments - Per capita taxes and assessments paid to the AFL-CIO and affiliated labor organizations are considered to be fully non-chargeable.

k. Death Gratuities - Death gratuities are benefits paid to a deceased member's family and are considered to be fully non-chargeable.

l. Building Expenses - This category represents expenses incurred by 1313 L Street for the operation and maintenance of the International Union's headquarters building, such as utilities, real estate taxes, insurance, repairs and maintenance and other related expenses. These expenses are allocated to chargeable and non-chargeable expenses based on the same ratio as personnel costs.

m. Member Telephone Calls and Visibility - These expenses are considered to be fully non-chargeable.

n. Regional Conferences and Joint Council Meetings - The International Union returns a portion of per capita taxes received from the local unions to the International Union's councils for regional conferences and joint council meetings. These governance meetings are considered to be fully chargeable.

o. Strike and Defense Funds - Expenses of the strike and defense funds include financial assistance to local unions involved in legitimate strikes in addition to providing financial assistance for educational programs including newspaper advertisements, leaflets, handbills, and other media-based messages concerning contract ratification. Expenses also include local union withdrawals of their per capita tax payments. All expenses of the strike and defense funds are considered to be fully chargeable.

p. Political Education and Action Funds - Expenses incurred by the Committee on Political Education and the Political Education and Action Funds relate entirely to political and legislative activities and are considered to be fully non-chargeable. The total expenses as reported in the audited consolidated financial statement have been modified to remove from expenses the political expenses paid from voluntary contributions.

q. Unity Fund - Expenses of the Unity Fund include financial assistance to local unions involved in Abreakthrough@ campaigns to increase union membership. These expenses are organizing in function and are considered to be fully non-chargeable.

r. Convention Fund - Expenses for the International Union's convention are considered to be fully chargeable.

s. Legal Defense Fund - Expenses incurred by the Legal Defense Fund are considered to be fully non-chargeable.

t. Eastern Conference Fund - Expenses incurred within this Fund are paid from funds transferred upon the dissolution of the Eastern Conference and are accordingly removed from the total expenses.

2005-2007 UNION SECURITY

(Professional and Technical, Supervisory, Administrative and Operations, Maintenance and Support Units)

1. Selection of Fee

Any employee covered by this Agreement shall, as a condition of employment, be required to choose from the options of membership in MSEA-SEIU or payment to MSEA-SEIU of a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract administration as defined by law. The amount of the fee charged to certain employees hired prior to July 2, 2003 (October 13, 2003 in OM&S Unit), who were not members of MSEA-SEIU on that date, will be capped for approximately the first year of the contract, as provided under the subsection titled "Calculation of Service Fee."

Employees shall be required to (a) sign a written payroll deduction authorization form authorizing deduction from their pay of the membership dues or service fee, or (b) tender the amount of the service fee due to the union, or (c) indicate in writing their religious objection to such fee and make contributions at least equal in amount to the service fee to a non-religious charitable organization mutually agreed upon by the employee so objecting and the Union. Employees choosing (b) or (c) shall make payments within ten (10) days after each payday.

The obligation to pay fees or dues shall become effective as follows:

a. For employees first hired after December 1, 2004, the payment obligation shall be effective at the

start of the pay period commencing closest to but not earlier than the thirtieth day after the end of their initial six months of probation;

b. For all other employees, the period commencing closest to but not earlier than July 1, 2005. This obligation shall be implemented simultaneously with the salary increase scheduled for July 2005.

2. Calculation of Service Fee

MSEA-SEIU shall determine the amount of the service fee to be charged to non-members, consistent with both applicable law and this Article and shall certify to the State the amount of the service fee.

Until the start of each employee's pay period commencing closest to but no earlier than July 1, 2006, the amount of the fee charged to employees (a) last hired prior to July 2, 2003 (October 13, 2003 in OM&S Unit); (b) who were neither members of MSEA-SEIU nor agency fee payers as of that date; (c) who have continued in that status since then; and (d) who choose not to join MSEA-SEIU; shall be capped at fifty percent of the otherwise-applicable service fee.

The service fee paid by part-time employees shall bear the same ratio to part-time dues as the fee paid by full time employees bears to the dues amount paid by full time employees.

3. Change of Status

Any employee may eliminate their payroll deduction for MSEA-SEIU membership or for the service fee at any time by providing written notice to the employee's payroll officer at least one pay period in advance of the change.

Employees may change their payroll deduction options regarding MSEA-SEIU membership or service fee status during the months of June and December. The right to join MSEA-SEIU shall be determined by the Union's own Constitution and Bylaws. Employees may otherwise change their status with regard to membership in MSEA-SEIU or service fee payer status at any time. Employees who are members of MSEA-SEIU may resign their membership at any time and revert to payment of the service fee described above or terminate payroll deduction and tender the required service fee or dues directly to MSEA-SEIU.

4. Payments and Deductions

It shall be the sole responsibility of MSEA-SEIU to collect its dues or service fees and to verify contributions made in lieu of service fees. No payroll deduction of service fees shall be made from workers' compensation benefits or for any payroll period in which earnings received are insufficient to cover the amount of the deduction, nor shall such deductions be made from subsequent payrolls to retroactively cover the period in question. Employees shall not be penalized for failing to pay service fees for any such pay period(s).

5. Notice and Audit

MSEA-SEIU shall calculate the amount of the fee after the close of its annual audit, based on the expenditures reflected in the most recent available audited records. That calculation shall also be audited to verify that the union's records have actually been audited; have been correctly reproduced from the audit report, and that the union has performed any mathematical adjustments correctly, and for any

other purpose required by law. The fee will be effective on a paydate at least 30 days after the notice described below has been mailed to members of the bargaining unit, or provided to newly eligible employees.

Once the audit is complete, MSEA-SEIU shall prepare a notice, consistent with applicable law, to all employees covered by this Agreement. Such notice shall be updated annually and shall explain the choices and indicate that the sums determined to be the service fee were audited by an independent auditor based on the union's financial records for its most recent fiscal year. The notices shall include all information required by applicable law, including at a minimum, the major categories of expenses, as reflected in the audit; whether each expense will be included in the service fee; the identity of the auditor(s); and the opinion of each audit, including the opinion included in any adjusted audit(s). The State agrees to distribute this notice and dues deduction forms, provided by MSEA-SEIU, to new employees at the time they are hired. MSEA-SEIU shall provide notices required by law to all current bargaining unit employees. Any change in the amount of the service fee to be deducted shall be certified to the Director of the Bureau of Employee Relations by the Treasurer of MSEA-SEIU at least thirty (30) days in advance of the change.

6. Religious Objectors

In the event that any employee covered hereby holds a sincere and bona fide religious belief that conflicts with an obligation to financially support MSEA-SEIU, public employee organizations or labor organizations in general, that employee shall have the right to refuse to make service fee payments;

provided, however; that said right to refuse shall continue only so long as the employee makes contributions at least equal in amount to the service fee to a non-religious charitable organization mutually agreed upon by the employee so refusing and the Union. Part-time employees' contributions to non-religious charitable organizations shall coincide in amount with the payments of those part-time employees paying the service fee. MSEA-SEIU shall not unreasonably deny the choice of such non-religious charitable organization suggested by the employee.

Should an employee have a pending written request for religious objector status or a pending administrative or legal challenge regarding their religious objector status, the employee must place an amount equal to the service fee in an interest-bearing escrow account pending resolution of such dispute or request. MSEA-SEIU shall pay for any maintenance fees associated with such escrow accounts. The State shall not be liable for any fees, costs, damages, expenses, or any other form of liability involved with regard to such escrow accounts.

7. Disputes

The amount of the service fee shall be subject to review pursuant to the American Arbitration Association's Rules for Impartial Determination of Union Fees. Pending resolution of any such dispute, the disputed amount of fees shall be placed in an interest-bearing escrow account. MSEA-SEIU shall pay for any maintenance fees associated with such escrow accounts. The State shall not be liable for any fees, costs, damages, expenses, or any other form of liability involved with regard to such escrow accounts.

MSEA-SEIU is solely responsible for payment of the fee charged by AAA for the cost of providing necessary administrative services. The arbitrator will be compensated by MSEA-SEIU, in accordance with the per-diem rate currently on file for that arbitrator with the AAA, and shall be reimbursed for expenses by MSEA-SEIU. Attorneys' fees, witness fees, and other expenses shall be borne by the respective parties. No fees, costs, damages, expenses, or other form of liability involved with regard to arbitration shall be borne by the State.

In the event a dispute under this Article is submitted to arbitration, the arbitrator shall have no power or authority to order the State to pay such service fee on behalf of any employee. If the arbitrator decides that an employee has failed to pay or authorize the payment of the service fee in accordance with this Article, the only remedy shall be the termination of the employment of such employee if the employee refused to pay or authorize payment of the required service fee and the State complied with the adverse employment action procedure described below.

8. Failure to Pay Fee

It shall be the sole obligation of MSEA-SEIU to certify to the State the name of each employee who has not paid his or her service fee or who has not made a contribution in lieu of a service fee and who, in the case of employees who are actively challenging the amount of the fee or the procedures implemented pursuant to this article, are not paying the disputed amount into the interest-bearing escrow account established by the union. MSEA-SEIU agrees to cooperate in any State investigation performed due to or in reliance upon each statement.

The Discipline article does not apply to employees who have not complied with this Article. The following procedure shall apply. On the first occasion the State determines, after an opportunity to investigate, that an employee failed to comply with this Article, the State shall provide the employee with notice of a finding of a violation of this Article and afford that employee a 30-day period to comply fully with this Article, paying all arrears due. Should the employee fail to timely correct this deficiency or should the employee be subsequently found by the State as failing to comply with this Article, the employee shall be provided with a notice of proposed dismissal. The employee will be afforded an opportunity to meet with the appointing authority or his/her representative prior to the action proposed. The employee will be entitled to have a Union representative or steward present. At that meeting, the appointing authority or his/her designee will give the employee an explanation of the employer's evidence against the employee (if that has not already been provided) and offer the employee an opportunity to respond. Any employee who has not timely complied with the obligations of this Article must be dismissed. A dismissal in compliance with this Article may not be challenged through the Grievance Procedure article of this agreement.

9. Indemnification

MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless against any claim, demand, suit, cost, expense, damages, or any other form of liability, including attorneys' fees, costs, or other liability arising from or incurred as a result of any act taken or not taken by the State, its members, officers, agents, employees, or representatives in complying with or carrying out the provisions

of this Article, including, but not limited to, as a result of being ordered to reinstate an employee terminated at the request of MSEA-SEIU for not paying the service fee; in reliance on any notice, letter, or authorization forwarded to the State by the union pursuant to this Article; and including but not limited to any charge that the State failed to discharge any duty owed to its employees arising out of the service fee deduction. MSEA-SEIU will intervene in and defend any administrative or court litigation concerning the propriety of any act taken or not taken by the State, including, but not limited to, termination for failure to pay the service fee. In such litigation the State shall have no obligation to defend its act taken or not taken.

10. Severability

Should the United States Supreme Court, the First Circuit Court of Appeals or any Court in Maine hold indemnity clauses relating to union security void or unenforceable on Constitutional or public policy reasons, this Article shall be stricken in its entirety upon written notification to MSEA-SEIU by the State. Should any Court find the indemnity clause in this Article to be void or unenforceable for any reason, this Article shall be stricken in its entirety upon written notification to MSEA-SEIU by the State. Should the State provide such written notification, the parties shall enter into negotiations regarding a replacement Union Security Article.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DANIEL B. LOCKE, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	2:05-112-GZS
EDWARD A. KARASS, STATE CONTROLLER, ET AL.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF TIMOTHY L. BELCHER

Timothy L. Belcher, on penalty of perjury, deposes and says:

1. My name is Timothy Belcher. I am above the age of 18. I make this Declaration in connection with Defendant Maine State Employees Association's ("MSEA's") Motion for Summary Judgment. The declaration is based on my own personal knowledge or on information obtained from MSEA business records.

2. Since June 27, 2005, I have held the position of MSEA Executive Director. From 1995 until October of 2005, I served as General Counsel of MSEA, and I served as a Staff Attorney for the union from November of 1989 until that promotion. MSEA is the exclusive collective bargaining representative of approximately 10,000 employees of the executive branch of Maine state government in the (1)

Administrative, (2) Operations Maintenance and Support, (3) Professional and Technical, and (4) Supervisory Services bargaining units of the State (hereinafter "the Maine bargaining units").

3. As the exclusive bargaining representative of the Maine bargaining units, MSEA is required by law to represent the interests of all of the employees in these units, and must provide extensive contract administration services, such as collective bargaining and grievance processing, for all such employees, regardless whether they are members of the union. In order to negotiate and administer collective bargaining agreements, MSEA employs 28 paid employees, as well as 292 stewards who receive direction and training from MSEA. MSEA pools the costs of providing these services among all bargaining units it represents, and provides services and resources on an as-needed basis, making the resources available to all MSEA-represented employees.

4. Prior to 2003, employees who worked in the Maine bargaining units but were not members of MSEA received contract negotiation and administration services from MSEA without paying any service fee, except that nonmember grievants could be charged for processing individual grievances. The vast majority of the cost of MSEA's contract negotiation and administration functions was borne by those employees who elected to join the Union and pay dues.

5. During the first half of 2003, I participated in contract negotiations with the State on behalf of the Maine bargaining units. In those contract negotiations, the State agreed to include a "union security" provision in the contract governing the Maine

bargaining units that would commence on July 2, 2003 for the Professional and Technical, Supervisory, and Administrative units, and on later dates in 2003 for the Operations, Maintenance and Support unit (hereinafter the 2003-2005 Contract). This "union security" clause provided, *inter alia*, that bargaining unit employees who were hired by the State after the effective date of the agreement and elected not to join the Union would be required to pay a "service fee" to the Union equivalent to their pro-rata share of the costs that MSEA incurs in providing collective bargaining and contract administration services on behalf of bargaining unit members. A true and correct copy of the union security provision of the 2003-2005 Administrative Services Contract is attached to this Declaration as Exhibit 1, and the union security provisions of all four 2003-2005 agreements were identical except that one of the agreements became effective after July 2, 2003.

6. MSEA calculates the "service fee" applicable to nonmember employees by determining what percentage of MSEA's expenditures are germane to the Union's representation of nonmembers (i.e., "chargeable" to nonmembers). Nonmember employees pay this percentage of regular union dues as a service fee. Thus, for example, if regular union dues are $6.00 weekly per member, and the Union determines that 50% of its expenditures were attributable to "chargeable" activities, nonmember employees in bargaining units represented by the Union would pay a weekly service fee of $3.00. Because MSEA cannot predict in advance precisely what proportion of the Union's budget will be spent on "chargeable" activities, the percentage used in calculating the service fee is

based on accounting figures from the Union's most recent available fiscal year.

7. MSEA's chargeable expenses include, for example, collective bargaining and contract administration, including contract negotiations and grievance processing; legal services related to union representational activities; and training union stewards and others, except training related to political or ideological subjects. Other expenses are treated as nonchargeable. MSEA treats, for example, lobbying and political expenses; any costs related to an income protection program, which is not funded through dues but is only available to union members; and charitable contributions as nonchargeable. Additionally, organizing-related expenses are treated as nonchargeable, even though the Union firmly believes them to be central to MSEA's role as an effective bargaining representative.

8. MSEA pays affiliation fees to its parent union, Service Employees International Union ("SEIU" or the "International Union"). The portion of this expenditure by MSEA that is deemed "chargeable" to nonmembers is based on SEIU's audited chargeable expenses for the most recently-available fiscal year. Whatever percentage of the International Union's expenditures were attributable to "chargeable" activities is used to calculate the portion of MSEA's transfer deemed "chargeable" to nonmembers. Thus, for example, if 50% of SEIU's budget was used for "chargeable" activities in the most recent available fiscal year, then 50% of MSEA's transfer to SEIU would be included in the amount of MSEA's expenditures deemed "chargeable" to nonmember employees through the service fee.

9. Because some of SEIU's affiliate unions treat organizing expenditures as chargeable to nonmembers while other affiliates treat these expenditures as nonchargeable, SEIU annually creates two different audit reports allocating its budget into chargeable and nonchargeable categories – one report classifies the expenses related to organizing as chargeable, while the other report classifies such expenses as nonchargeable. Affiliate unions use whichever of these audit reports they believe appropriate in determining what percentage of transferred funds to include as chargeable in their calculation of nonmember service fees. Because MSEA is treating organizing expenditures as nonchargeable, we use the SEIU audit report that classifies organizing expenditures as nonchargeable.

10. In February and March of 2005, I participated in contract negotiations with the State for the current contract governing the four Maine bargaining units, which became effective on July 1, 2005 (hereinafter the "2005-2007 Contract"). In these negotiations, the parties agreed to new union security language, extending the service fee obligation to all nonmember employees in the four bargaining units. However, nonmember employees in the Maine bargaining units who were hired prior to the effective date of the 2003-2005 agreement, and who have not been members of MSEA or fee payers since that date are subject to a "grandfather clause" which provides that they are required to pay only 50% of the applicable service fee through June 30, 2006. A true and correct copy of the union security provisions of the 2005-2007 Administrative Services Contract is attached to this Declaration as Exhibit 2. The Union Security Article

of that agreement is identical in all respects to the other three 2005-2007 agreements, except for references in the Operations, Maintenance and Support agreement article to the effective date of the 2003-2005 agreement for that unit.

11. MSEA began collecting service fees from nonmember employees pursuant to the 2005-2007 Contract on July 27, 2005, after the first full pay period of July 2005. These collections are made either through payroll deduction or through direct billing. Based on MSEA's business records, none of the named Plaintiffs in this lawsuit have authorized payment of their service fees through payroll deduction.

12. I have participated in the preparation of notices and materials sent to employees in the Maine bargaining units regarding their service fee obligations under the 2005-2007 Contract. The first such notice was mailed on April 11, 2005 (hereinafter the "April Notice"). A true and correct copy of the April Notice is attached to this Declaration as Exhibit 3.

13. Because more recent financial information became available for MSEA after the April Notice was issued, and because based on that information the calculated service fee was lower than the amount previously calculated, MSEA mailed a second notice to all employees in the Maine Bargaining Units on June 10, 2005 (hereinafter the "June Notice"). A true and correct copy of the June Notice is attached to this Declaration as Exhibit 4.

14. Subsequent to the June Notice, MSEA made a determination to treat union organizing expenditures (which had previously been treated as "chargeable" in the calculations set forth in the April and June Notices) as nonchargeable to nonmember employees.

This change reduced the percentage of union dues that nonmember employees would pay from approximately 70% of union dues to approximately 49% of union dues.

15. Accordingly, on July 13, 2005, MSEA mailed a third notice to all nonmember employees and all members who had joined the union since the issuance of the April 11 Notice (hereinafter the "July Notice"). A true and correct copy of the July Notice is attached to this Declaration as Exhibit 5. Because MSEA now treats organizing expenditures to be "nonchargeable," the July Notice provided the version of SEIU's audit report classifying such expenditures as similarly nonchargeable at the International level. The July Notice included the entirety of the SEIU audited "Consolidated Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses - Alternative Basis of Allocation" report for 2003, SEIU's most recently audited year.

16. The seven-page cover letter sent with the July Notice explained that the service fee charged to nonmembers would be significantly lower than the fee originally announced in the April Notice and explained the fee calculation in detail. The letter informed the post-Notice members of their right to withdraw their membership and elect to pay the lower service fee.

17. The service fee collected is based on the service fee percentage calculation outlined in the July 13 Notice (*i.e.*, 49.13% of member dues, or $8.94 per bi-weekly pay period for employees paying the full service fee). In accordance with the "grandfather clause" provision included in the 2005-2007 Contract, all nonmember employees hired prior to the effective date of the 2003-2005 contract, who have not been members of MSEA or fee payers since that date, including all

named plaintiffs in this action, are charged only 50% of the calculated service fee through June 30, 2006, or $4.47 per bi-weekly pay period. *See* Exhibit 5 at 2, 30.

18. All three of the Notices issued by MSEA detail procedures by which nonmember employees can submit challenges to the Union's calculated service fee. In response to the Notices, several nonmember employees, including plaintiff Margaret P. Rudolf, have filed challenges to MSEA's calculation of the service fee. These challenges were scheduled to be adjudicated by an independent arbitrator on October 28, 2005. The hearing was postponed until early-December 2005, and MSEA expects the arbitrator to issue a decision in spring 2006.

19. Pursuant to the procedures set up by MSEA, all service fees collected by MSEA from nonmember employees are held in an independent escrow account, and none of these monies will be released to MSEA from the escrow account before the independent arbitrator has resolved all challenges to MSEA's calculation of the service fee. At that time, refunds (if any) required to be made pursuant to the arbitrator's decision will be provided to service fee payers, with interest.

20. The 2005-2007 Contract contains provisions permitting the Union to enforce nonmembers' service fee obligations, subject to extensive protection of nonmembers' rights. If an employee has refused to pay, the Union must certify to the State that the employee has not paid. The State may not take any action against the employee until after the State has completed an investigation regarding any payment delinquency, as well as to determine whether the Union has complied with the collective bargaining

agreement and the law. Once that investigation is complete, if the employer concludes that the employee is delinquent in payments, the employee is given a thirty days to comply. Should the employee refuse to comply at that stage, he or she would be afforded additional procedures prior to any termination.

21. To date, the Union has not requested any disciplinary action against any nonmember for non-payment of service fees.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and is based on my personal knowledge. Executed this 24th day of January, 2006 at Augusta, Maine.

/s/ Timothy L. Belcher
Timothy L. Belcher

[Certificate of Service Omitted]

PETITIONER'S BRIEF

FILED
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SUPREME COURT, U.S.

No. 07-610

IN THE

Supreme Court of the United States

DANIEL B. LOCKE ET AL., ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER, ET AL.,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the First Circuit

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May 2008

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QUESTION PRESENTED

In *Ellis v. Railway Clerks*, this Court unanimously "determined that the [Railway Labor Act], as informed by the First Amendment, prohibits the use of dissenters' [union] fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (opinion of Blackmun, J., *citing Ellis*, 466 U.S. 435, 453 (1984)). In *Lehnert*, a four-member plurality held "that the Amendment proscribes such assessments in the public sector." 500 U.S. at 528. Moreover, Justice Scalia's separate opinion, concurring in part in the judgment announced by Justice Blackmun, concluded that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." *Id.* at 555.

May a State, nonetheless, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside of a nonunion employee's bargaining unit?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

> Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, Beth Weirich, Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of the Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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Baird, Charles W., *Toward Equality and Justice in Labor Markets*, J. Soc. Pol. & Econ. Stud. (1995) 47

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Hutchison, Harry G., *Reclaiming the First Amendment Through Union Dues Restrictions*, 10 U. Penn. J. Bus. & Emp. Law 663 (forthcoming 2008) 52

Madison, James, 2 *The Writings of James Madison* (Hunt ed. 1901) 41

Moorehouse, John C., *Compulsory Unionism and the Free-Rider Doctrine*, 2 Cato J. 619 (1982) 46

Stern, R., Gressman, E, Shapiro, S. & Geller, K., *Supreme Court Practice* (8th ed. 2002) 39

The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70 (1977) 52

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is officially reported at 498 F.3d 49 (1st Cir. 2007), and is reprinted as Appendix A to the Petition for *Certiorari* ("Pet. App.") at 1a. The decision of the United States District Court for the District of Maine granting Defendants' Motions for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, Pet. App. B at 42a, is reported at 425 F. Supp. 2d 137 (D. Me. 2006).

Jurisdiction

The United States Court of Appeals for the First Circuit entered its judgment on 8 August 2007. The Petition for a Writ of *Certiorari* was timely filed on 6 November 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1) (West 1993).

Constitutional and Statutory Provisions Involved

The **First Amendment of the United States Constitution** provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I.

The **Fourteenth Amendment** provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The state statute involved is Maine's State Employees Labor Relations Act, 26 ME. REV. STAT. ANN. § 979 *et seq.*, which provides in pertinent part that "the public policy of th[e] State" and "the purpose of this chapter" is to provide "a uniform basis for recognizing the right of state or legislative employees to join labor organizations of their own choosing and to be represented by such organizations in collective bargaining for terms and conditions of employment." To that end, Maine law specifically recognizes that such a "[b]argaining agent" "has as its primary purpose the representation of employees in their employment relations with employers," § 979-A(1), "for the purposes of representation and collective bargaining," § 979-B, and provides specific definitions of "[c]ollective bargaining" and the "obligation ... to bargain." § 979-D.

STATEMENT OF THE CASE

I. The Facts

Petitioners Daniel Locke *et al.* ("the Nonmembers") are twenty current or former public employees in four bargaining units within the State of Maine's executive branch. The Maine State Employees Association ("MSEA"), Local 1989, Service Employees International Union, is designated as their collective bargaining representative, but they are not members of MSEA.

Nevertheless, the Nonmembers are required by the collective bargaining agreements governing their terms and conditions of employment to pay to MSEA "a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining

and contract administration as defined by law."[1] Joint Appendix ("Jt. App.") at 33-34, ¶ 22. MSEA is affiliated with various other labor unions, including—as its name suggests—the Service Employees International Union ("SEIU").

MSEA prepared and distributed two "*Hudson*" notices[2] to the Nonmembers to explain that members' dues exceed the amount expended for its collective bargaining "services." Pet. App. A at 2a-6a; 498 F.3d at 51-53. The excess fees are referred to in case law and in MSEA's "*Hudson*" notice as "nonchargeable" expenses; the collective bargaining fees are called "chargeable expenses." Pet. App. A at 4a n.5; 498 F.3d at 51 n.5.

MSEA's notices revealed that a portion of the fees treated as chargeable by MSEA is paid to the SEIU to subsidize its own and its affiliates' litigation concerning bargaining units other than the Nonmembers', including units outside Maine. *Id.* at 5a; 498 F.3d at 52;[3] *see also* Jt. App. at 54, and 57-58.

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[1]Certain nonmembers, including Petitioners, were initially subject to a "grandfather" clause limiting the fee to one-half paid by employees hired after 2 July 2003. Pet. App. A at 4a n.6; 498 F.3d at 52 n.6. That exception expired after one year, and since then all nonmember employees have been required to pay the full agency fee.

[2]This notification process stems from *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306-10 (1986).

[3]The First Circuit stated that:

> MSEA included in its calculation of chargeable expenditures those costs of litigation (by both itself and SEIU) that was germane to collective bargaining. This meant that nonmembers contributed, through their service fees, to some

(continued...)

At issue here is that portion of the fee expended for MSEA affiliates' extra-unit litigation activities, which MSEA claims to be fully chargeable to objecting nonmembers. Jt. App. at 53, 58, 85, & 89.

II. The Proceedings Below

On 16 June 2005, the Nonmembers filed this class action lawsuit alleging, *inter alia*, that MSEA and the State Defendants[4] were collecting and/or were attempting to collect agency fees that:

> will be used by Defendant MSEA and/or its affiliates for purposes that are not "germane" to collective-bargaining activity, not justified by the government's vital policy interest in labor peace and avoiding "free riders," and/or significantly add to the burdening of free

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[3](...continued)
litigation that was not undertaken specifically for their own bargaining unit, but rather was conducted by or on behalf of other units or the national affiliate, sometimes in other states. Included within this general category of expenditures were the salaries of SEIU's lawyers, and other costs of providing legal services to bargaining units throughout the country.

Pet. App. A at 5a; 425 F.3d at 52.

[4]The State Defendants are Edward A. Karass, Controller for the State of Maine, Rebecca M. Wyke, Commissioner of its Department of Administrative and Financial Services, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, who enforced, for MSEA's benefit, the contractual provisions authorizing the exaction of forced fees as a condition of continued employment.

> speech that is inherent in the allowance of an "agency shop," including, but not limited to:
>
> . . . .
>
> c. litigation that does not concern the dissenting nonmember's bargaining unit and union literature reporting on such activities;

Record ("R.") 1: Complaint, ¶ 33.

The Nonmembers later amended and supplemented their Complaint when MSEA issued a new "*Hudson*" notice in response to the lawsuit. Jt. App. at 26-104. MSEA's new notice persisted in claiming that its affiliates' extra-unit litigation expenditures were chargeable. *Id.* at 41, ¶ 36(c), 85, & 89. Specifically, MSEA's notice defines "Chargeable expenses" as:

> those incurred by the International Union [SEIU] that reflect the share of the costs of operations of the International Union which are considered necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: ... settling grievances and disputes ... in arbitration, court or otherwise.

Jt. App. 89. As a result, MSEA's notice treated $4,819,767 in SEIU's "Professional fees and expenses," including litigation expenses, as "chargeable" to the Nonmembers. Jt. App. 85.

The Complaint sought declaratory and injunctive relief, equitable restitution, and attorneys' fees and costs for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983. R. 1, ¶¶ 1, 3. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343. *Id.* at ¶¶ 2-3.

After discovery, and upon cross-motions for summary judgment, the trial court held "as a matter of law that the inclusion of the cost of extra[-unit] litigation does not violate Plaintiffs' constitutional rights." Pet. App. B at 58a; 425 F. Supp. 2d at 147.

The trial court reasoned that Justice Blackmun's plurality opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991), holding extra-unit litigation nonchargeable "was joined only by Chief Justice Rehnquist and Justices White and Stevens," and therefore "does not state a majority opinion that is binding on this Court." Pet. App. B at 57a-58a; 425 F. Supp. 2d at 146. The trial court, instead, found more persuasive the decisions of the Third and Sixth Circuits that declined to follow both Justice Blackmun's opinion and the Court's earlier ruling in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (Railway Labor Act ("RLA") case) upon which Justice Blackmun relied. Pet. App. B at 58a, 425 F. Supp. 2d at 147, *citing Reese v. City of Columbus*, 71 F.3d 619, 624 (6TH CIR. 1995), *and Otto v. Pennsylvania Education Ass'n*, 330 F.3d 125, 138 (3D CIR. 2003). The district court therefore entered judgment for Defendants. R. 91: Judgment.

The Nonmembers timely appealed, and a three-judge panel of the United States Court of Appeals for the First Circuit affirmed. Pet. App. A at 34a; 498 F.3d at 66.[5]

Unlike the district court,[6] the panel acknowledged that this Court held in *Ellis* that:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.***

466 U.S. at 453 (emphasis added), *quoted at* Pet. App. A at 13a; 498 F.3d at 56 (without emphasis).

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[5]The Nonmembers also appealed from the denial of their Motion for Class Certification, R. 55, which had been found to be moot. Pet. App. B at 67a; 425 F. Supp. 2d at 151. Because the First Circuit affirmed the district court in all of its particulars, it did not reach this issue. Pet. App. A at 7a n.8; 498 F.3d at 53 n.8.

[6]The trial court referred to *Ellis* only for the proposition that "'advance reduction of dues and/or interest-bearing escrow accounts' would protect nonmembers from any First Amendment violations." Pet. App. B at 59a n.5; 425 F. Supp. 2d at 147 n.5.

The panel likewise recognized that the expenditures at issue here are "litigation expenses incurred by [MSEA's] national affiliate" for "litigation on behalf of, or by, a union entity other than the local which represents the nonmember employees." Pet. App. A at 2a & n.1; 498 F.3d at 50 & n.1.

Nevertheless, purporting to rely upon *Lehnert* instead of *Ellis*, the panel held that:

> *Lehnert* addressed a different factual context —a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*.... *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Pet. App. A at 29a; 498 F.3d at 63-64, *citing* 500 U.S. at 523-24.

SUMMARY OF ARGUMENT

Twice—in *Ellis*, and again in *Lehnert*—this Court has held that litigation expenses for which nonmembers may be compelled to support their exclusive-bargaining representative are limited to litigation arising within the nonmembers' bargaining unit, *i.e.*, of "fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative." *Ellis*, 466 U.S. at 453; *accord Lehnert*, 500 U.S. at 528 (Blackmun, J.); *see id.* at 555 (Scalia, J.).

The extra-unit litigation activities of union affiliates at issue here violates this standard, and significantly adds to the infringement on the Nonmembers' First-Amendment rights. Union litigation for bargaining units far afield from the Nonmembers' State of Maine bargaining units is not germane to the bargaining process established by Maine statute, nor to the Nonmembers' statutorily- and/or contractually-established grievance procedures.

The narrow rule prohibiting charges for extra-unit litigation stated in *Ellis* and followed in *Lehnert* is consistent with this Court's standard that infringements on the freedoms not to speak, associate, and petition government are permissible only when narrowly tailored to serve a compelling state interest. In the context of union forced fees cases, the governmental interest served is to reimburse an exclusive representative for costs incurred in performing its

duties in dealing with the employees' employer on labor-management issues in the employees' bargaining unit. Nonunion public employees cannot be compelled to subsidize activities which add significantly to the serious infringement on their First-Amendment rights already inherent in the coerced support of bargaining-unit collective bargaining, contract administration, and grievance adjustment with their employer.

The confusion which misled the lower courts in this case and others arises from this Court's badly-splintered decision in *Lehnert*, in which this Court established standards by which **other** extra-unit activities could be measured. The multiple opinions in *Lehnert* led to this confusion among the lower courts, with numerous courts reaching conflicting opinions on critical chargeability issues.

The lower courts' treatment of extra-unit litigation expenditures is symptomatic of the larger problem created by the Court's failure in *Lehnert* to apply explicitly the "strict-scrutiny" analysis normally applied in analogous cases relating to compelled speech, which always constitutes content-based regulation of speech.

This case provides the Court with an opportunity to clarify the standards to be applied to this confused area of the law, and establish a uniform standard by which the compelled speech inevitable in any compelled-dues scheme can be appropriately limited to the bargaining unit.

ARGUMENT

I. This Court Prohibited the Use of Forced Dues for Extra-Unit Litigation More Than Two Decades Ago in *Ellis*.

In *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), this Court unanimously and categorically held that "the RLA,[7] as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (Blackmun, J.). This Court's *Ellis* holding was unequivocal:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. ***The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*** Contrary to the view of the Court of Appeals, therefore, ***unless the[ir] ... bargaining unit is directly concerned***, objecting employees need not share the costs of the union's challenge to

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[7] 45 U.S.C. § 152, Eleventh.

> the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

466 U.S. at 453 (emphasis added).

In evading this categorical holding, the First Circuit made two erroneous findings as to why *Ellis* is not controlling here. First, disingenuously relying upon a general formulation of the issue appearing earlier in the *Ellis* opinion, the First Circuit asserted "that *Ellis* addressed only 'litigation *not* involving the negotiation of agreements or settlement of grievances.'" Pet. App. A at 28a; 498 F.3d at 63 (*quoting Ellis*, 466 U.S. at 440) (emphasis added).

But this Court explicitly held nonchargeable in *Ellis* "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings." 466 U.S. at 453. That litigation was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1068, 1074 (9TH CIR. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. at 453.

"[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly also is "a normal

incident of the duties of the exclusive representative." Nevertheless, such expenditures, too, were held nonchargeable by *Ellis*, unless the nonmembers' "bargaining unit is directly concerned." 466 U.S. at 453.

In *Lehnert*, Justice Blackmun confirmed *Ellis*' holding that bargaining-related litigation on behalf of other units was nonchargeable. He specifically mentioned "union litigation" involving "bankruptcy proceedings" and "employment discrimination," when he ruled that the general principle permitting pooling of otherwise chargeable parent-union expenditures does not apply to extra-unit litigation, even if bargaining related. 500 U.S. at 528, *citing Ellis*, 466 U.S. at 453.

Second, the First Circuit reasoned that:

> the *Ellis* court was not confronted with a pooling arrangement ...; its decision pertained only to direct contribution of local union monies to litigation efforts by other units (or a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time.

Pet. App. 27a-28a, 498 F.3d at 63. But *Ellis* also involved a "pooling arrangement" —that is, the aggregation of nonmembers' forced fees in a national affiliate's general treasury from which litigation could be funded in any bargaining unit, including the dissenting nonmembers'—not direct contributions of a local's monies to litigation in other units without expectation of later reciprocal contributions. *See* p. 22, *infra*.

Thus, the First Circuit's "pooling" argument is a red herring, because the underlying and specific

chargeability standard for litigation expenses applies equally to "pooled" expenses and direct contributions. Nor does "pooling" change the need for the government to justify the forced fees by a showing that compelling these Maine State employees to subsidize litigation on behalf of other bargaining units in other states and under other labor statutes (or in other sectors of the economy) is the least restrictive means to serve a compelling State interest. The "pooling" argument fails to satisfy that standard.

Coerced subsidies of litigation expenses not directly concerning the Nonmembers' bargaining unit compel association with other groups of employees, a form of petition and speech that is fully protected by the First Amendment. *See In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation).

The First Circuit's justification for these serious infringements on First-Amendment freedoms was its assessment that:

> litigation is not susceptible to a single label. Some litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities. However, other litigation may be central to the negotiation and administration of a collective bargaining agreement. In this case, the appellants have not challenged MSEA's characterization of the litigation for which the nonmembers were charged as "related" to collective bargaining. There is no contention that the litigation at issue is purely expressive or political.

Pet. App. A at 30a-31a; 498 F.3d at 65. The First Circuit then concluded that, rather than apply *Ellis*' specific categorical rule, it would apply the general three-part test in *Lehnert*.[8] *Id.* at 31a; 498 F.3d at 65.

The First Circuit's conclusion that some distinction exists between litigation "'related' to collective bargaining" on behalf of other units and "purely expressive or political" litigation is wholly unsupported by *Ellis* or any other decision of this Court. Indeed, that argument is essentially the "union strength and bargaining power" argument that *Ellis* rejected with regard to organizing and extra-unit litigation. *See* 466 U.S. at 441, 451-53.

Ellis rejected the argument that "litigation seeking to protect the rights of [represented] employees generally" was chargeable, holding that there must be a "connection to the bargaining unit" even for litigation that is not "purely expressive or political" (in the First Circuit's view), such as "bankruptcy proceedings" or "suits alleging violations of the nondiscrimination provisions of Title VII." *Id.* at 453.

The reason is simple: litigation is petitioning of government protected by the First Amendment. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S.

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[8]The *Lehnert* majority held that "chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519.

449, 460 (1958) (recognizing litigation as a form of petition under the First Amendment).

Nothing in this Court's opinions suggests that union costs related to core First-Amendment activities may be taxed to unwilling nonmembers simply because union members in more than one unit choose to affiliate. *Cf. Davenport v. Washington Educ. Ass'n*, ___ U.S. ___, 127 S. Ct. 2372, 2380 n.2 (2007) (rejecting notion that union's "improvident accounting practices" impact the constitutionality of statutory protection of nonmembers' rights). Nor is sufficient justification provided by the union's self-serving assertion that litigation about a bargaining unit far removed from Maine (perhaps in California, or Washington, or in private-sector bargaining units under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*) might somehow benefit the Nonmembers' State of Maine bargaining units.[9]

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[9]Maine law does not support such an argument, either. When Maine's Supreme Judicial Court ("SJC") decided that an "agency shop" provision is permissible in State employment, it did so narrowly. Citing the employees' "obligation, statutorily imposed, to accept the services of that bargaining agent for representational and collective bargaining purposes," and the union's correlative "obligation, statutorily imposed, to represent all the employees within the bargaining unit 'without regard to membership in the organization certified as bargaining agent,'" Maine's SJC held:

> It is fairly within the compass of this mutuality of obligation established by statute that each employee within the bargaining unit share in defraying **the costs of the representational and collective bargaining services that the bargaining agent is required to provide** without discrimination.

(continued...)

The First Circuit's attempts to distinguish *Ellis* are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. Later, writing in *Lehnert*, both Justices Blackmun and Scalia, between them writing for a majority of the Court, recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here, and the First Circuit should have applied and followed it.

The Court's conclusion in *Ellis*, 466 U.S. at 453, and its application of that bright-line rule in *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.), are hardly surprising. As Justice Blackmun recognized, litigation is an activity fraught with First-Amendment implications. 500 U.S. at 528 ("extraunit litigation [is] more akin to lobbying in both kind and effect"); *see Patterson*, 357 U.S. at 460 (recognizing litigation as a form of petition under the First Amendment). Likewise, association for the purpose of pursuing litigation is subject to First-Amendment protections.[10]

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[9](...continued)
Opinion of the Justices, 401 A.2d 135, 147 (ME. 1979) (emphasis added).

[10]*See NAACP v. Button*, 371 U.S. 415, 431 (1963) (for certain groups, "association for litigation may be the most effective form of political association") (*cited in Lehnert*, 500 U.S. at 528); *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 6 (1964) (striking down bar action against union legal aid program on First-Amendment grounds); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (same).

Thus, litigation is a form of petition, association, and expression protected by the First Amendment. *In re Primus*, 436 U.S. at 428; *United Transp. Union v. State Bar*, 401 U.S. 576, 580 (1971); *Button*, 371 U.S. at 429, 431. Indeed, litigation "related to labor issues will frequently constitute political activity which lies at the core of first amendment protections." *UAW v. Nat. Right to Work Legal Def. & Educ. Found., Inc.*, 590 F.2d 1139, 1147-48 (D.C.CIR. 1978).

The issue presented here, *i.e.*, whether activities freighted with First-Amendment concerns may be financed with compelled union fees outside of the narrow context of the bargaining unit, is correlative to the issues this Court addressed in *Patterson* and *Button*.

However, under this Court's standards, litigation activities for the Nonmembers' bargaining unit may be financed from compelled union fees. "[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Ellis*, 466 U.S. at 455. But as *Ellis* recognized, litigation on behalf of the bargaining unit is "germane"—*i.e.*, closely akin, or at once relevant and appropriate—to the purpose for which the Court has countenanced the impingement. It is also closely related to a union's status as the employees' bargaining representative under state law.[11]

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[11]The governing statute—the State Employee Labor Relations Law—defines a "bargaining agent" as "any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with

(continued...)

In this sense, litigation on behalf of the bargaining unit is akin to another form of union speech in a public forum that *Lehnert* found chargeable: "legislative lobbying or other political union activities" for "ratification or implementation of *petitioners' collective-bargaining agreement*." 500 U.S. at 522, 527 (emphasis added). However, "[w]here ... the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement," *i.e.*, extra-unit lobbying, *Lehnert* found "the connection to the union's function as bargaining representative too attenuated to justify compelled support by objecting employees," *id.* at 520, noting that "[t]he burden upon freedom of expression is particularly great where ... the compelled speech is in a public context." *Id.* at 522; *see id.* at 559 (Scalia, J.).

Similarly, litigation involving other bargaining units bears no such relation—and is therefore not "germane"—to the purposes for which MSEA has been imposed as the Nonmembers' exclusive bargaining representative, nor is it within the scope of the duties owed by MSEA to the Nonmembers. 26 ME. REV. STAT. ANN. § 979 (specifying duties owed under statute); *see also Opinion of the Justices*, 401 A.2d at 147 (holding that "[i]t is fairly within the compass of this mutuality of obligation established by statute that each employee within the bargaining unit share in defraying *the costs of the representational and collective*

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[11](...continued)
employers." 26 ME. REV. STAT. ANN. § 979-A(1). Maine law also defines the obligation imposed upon such a bargaining agent. *See generally* 26 ME. REV. STAT. ANN. § 979-D.

bargaining services that the bargaining agent is required to provide without discrimination.") (emphasis added).

This Court's forced-fees jurisprudence does not support the proposition that employees who desire to have no voluntary relationship with a union can be compelled to subsidize its litigation activities for unions and bargaining units far afield from their own. Such litigation may advance the interests of other unions and bargaining units, often in other jurisdictions. But the Nonmembers' employment interests are not advanced by such litigation, except, perhaps, in the "too attenuated" way that support for political candidates, lobbying, public relations, or organizing might advance their interests. *See Lehnert*, 500 U.S. at 520, 528 (Blackmun, J.); *id.* at 559 (Scalia, J.).

Indeed, extra-unit litigation might well **directly conflict** with the interests of the State employee Nonmembers. For example, the litigation could involve bargaining units of local government employees an MSEA affiliate represents in a locality in which a Nonmember resides. Under these circumstances, such litigation would not only not be "germane" to the Nonmember's employment relations, but would directly impact his or her interests as a citizen, taxpayer, and/or competitor for scarce public resources. Thus, just as with lobbying and public-relations activities, "[b]y utilizing [the Nonmembers'] funds ..., the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" *Lehnert*, 500 U.S. at 522 (Black-

mun, J.), *quoting Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

II. *Lehnert* Neither Alters Nor Diminishes the Authority of This Court's Existing Bar on the Use of Forced Dues for Extra-Unit Litigation.

The panel below purported to rely heavily upon this Court's divided decision in *Lehnert*, but then found a distinction, reasoning that:

> *Lehnert* addressed a different factual context —a pooling arrangement—and explored the reasons that pooled expenditures for litigation fall outside the rule articulated in *Ellis*.... *Ellis* continues to be good law, and to mean what it literally says, in cases involving a unit's direct expenditures to support litigation by other bargaining units. But where monies are spent in a pooling arrangement, as described by *Lehnert*, *Ellis* does not bar the chargeability of extra-unit litigation expenses, and *Lehnert*'s definition of germaneness, applicable generally to pooling arrangements, applies sensibly to litigation expenses funded by such a pooling arrangement.

Pet. App. A at 29a; 498 F.3d at 63-64, *citing Lehnert*, 500 U.S. at 523-24. However, the panel created a distinction where none exists on the facts or the law.

In fact, the litigation expenditures at issue in *Ellis* were not from "local union monies" contributed to other

units or the national affiliate. They were litigation expenditures of the national affiliate (Grand Lodge) to which the plaintiff nonmembers paid part of their dues directly.[12] In short, they were "pooled" monies. Indeed, *Lehnert* noted that the Court recognized the pooling arrangement in *Ellis*. *See* 500 U.S. at 523.

Even accepting the dubious proposition that this Court in *Lehnert* abandoned its categorical holding in *Ellis sub silentio*, or wrote exceptions into *Ellis* just seven years after its unanimous and categorical holding, extra-unit litigation fails the *Lehnert* plurality's general test. 500 U.S. at 524.

This was, after all, Justice Blackmun's conclusion. *Id.* at 528. Justice Blackmun's application of his own test is certainly more authoritative than that of any lower courts. Justice Blackmun made clear that extra-unit litigation expenses are never chargeable: "Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, we hold that the Amendment proscribes such assessments in the public sector." *Id.* (citation omitted).

All extra-unit litigation fails at least two elements of the three-part *Lehnert* test, 500 U.S. at 519, as Justice Blackmun's plurality opinion ruled. First, "extra-unit litigation [is] more akin to lobbying in both

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[12]*See Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2341 (S.D. CAL. 1976), *further proceedings*, 108 L.R.R.M. (BNA) 2648, 2650 (S.D. CAL. 1980), *aff'd in part, rev'd in part*, 685 F.2d 1065, 1068, 1073 (9TH CIR. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984).

kind and effect," and thus adds significantly to the burden of the agency shop on free speech, the third prong. Second, Justice Blackmun recognized that which the courts below refused to recognize: "When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative," the first prong. *Id.* at 528.

Thus, extra-unit litigation is akin to the organizing found completely nonchargeable in *Ellis*, 466 U.S. at 451. There, the Court held organizing to be nonchargeable to objecting nonmembers based upon "several considerations." *Id.*

First, the Court noted that "the notion that [RLA] § 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history." Moreover, "where a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented." 466 U.S. at 452. A "union's organizing efforts outside the bargaining unit" are not directed at "the employee the union was required to represent and from whom it could not withhold benefits obtained for its members."

Moreover, the benefits from organizing—where "money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues"—is roughly comparable to that resulting from union contributions to pro-labor political candidates. The nonmember thus is, with

regard to organizing, "a far cry from the free-rider ... with which Congress was concerned." *Id.* at 452-53.[13]

Similarly, extra-unit litigation is akin to the extra-unit lobbying expenditures also found nonchargeable in *Lehnert*, 500 U.S. at 519-22. Two factors were important in assessing that activity: the nature and content of the activity; and the forum in which it occurs.

The Court focused on the fact that "the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally." Consequently, the Court held that "the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520.

The Court expressed particular concern with the fact that "our national and state legislatures, the media, and the platform of public discourse are public fora open to all." *Id.* at 521. In light of this fact, the Court held that "the so-called 'free-rider' concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement." *Id.* at 521.

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[13]The Court also rejected charging nonmembers for the union's efforts to persuade employees within the union to join the union, albeit for a different reason: "it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n.13.

Moreover, as with litigation expenditures, the Court recognized the "'additional interference with the First Amendment interests of objecting employees'":

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Id. at 521-22 (citations omitted), *quoting Ellis*, 466 U.S. at 456.

Based upon these principles, the Court concluded that lobbying expenditures for purposes other than "ratification or implementation of [the nonmembers'] collective bargaining agreement" may not properly be charged to them. *Id.* at 527 (opinion of Blackmun, J.); *see also id.* at 559 (opinion of Scalia, J.) (agreeing "that the challenged lobbying expenses are nonchargeable").

All of the considerations that apply to organizing and lobbying also apply to extra-unit litigation activi-

ties. Consequently, recognizing the "important political and expressive nature of litigation," *i.e.*, that it "entail[s] speech of a political nature in a public forum," and that extra-unit litigation is "not germane to the union's duties as exclusive bargaining representative," the *Lehnert* plurality concluded that the First Amendment "proscribes such assessments in the public sector." *Id.* at 528.

Extra-unit litigation fares no better under Justice Scalia's "statutory duties" and "duty of fair representation" test:

> I would hold that to be constitutional a charge must *at least* be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since [*Machinists v.*] *Street*[, 367 U.S. 740, 774 (1961)]: A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

Id. at 558 (Scalia, J., concurring in the judgment in part, dissenting in part) (original emphasis).

In applying his "statutory duties" test, Justice Scalia agreed with the majority that nonmembers can be compelled to subsidize "a pro rata assessment of NEA's costs in providing collective-bargaining services ... to its affiliates ...." *Id.* at 561. However, Justice Scalia's opinion nowhere said that extra-unit litigation is among those "chargeable, on-call services," listing only "negotiating advice, economic analysis, and

informational assistance." *Id.* Notably, although his opinion primarily discussed his disagreements with Justice Blackmun, Justice Scalia did **not** say that he disagreed with Justice Blackmun's conclusion about extra-unit litigation.

Most importantly, Justice Scalia quoted with approval the holding of *Ellis* that nonmembers can be charged "*only* [expenses] for litigation 'incident to negotiating and administering *the contract* or to settling grievances and disputes *arising in the bargaining unit*,' and 'other litigation ... *that concerns bargaining unit employees* and is normally conducted by the exclusive representative.'" *Id.* at 555 (emphasis added) (*quoting Ellis*, 466 U.S. at 453).

Justice Scalia then concluded that "there is good reason to treat [*Ellis* and other private-sector cases] *as merely reflecting the constitutional rule*." *Id.* (emphasis added). Justice Scalia thus implicitly concluded extra-unit litigation is not constitutionally chargeable, under his general test.[14]

Thus, under either the *Lehnert* plurality's test, or that of Justice Scalia, reversal of the court below is mandated.

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[14]This inference has been drawn by the lower courts in *Browne v. Wisconsin Employment Relations Commission*, 485 N.W.2d 376, 388 (WISC. 1992), *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (IND. CT. APP. 1992), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (IND. 1992), and *Pilots Against Illegal Dues ("PAID") v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1129-31 (10TH CIR. 1991).

III. Compelled Speech Is Subject to Strict Scrutiny.

There is a reason that extra-unit litigation is deemed nonchargeable: this activity, in essence, compels the Nonmembers to speak against their will in a public forum, and is therefore subject to a "strict scrutiny" analysis.

In its government-mandated speech cases, this Court has long applied the most rigorous analysis—"strict scrutiny"—in adjudicating infringements on First-Amendment freedoms. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 798 (1988). Content-based regulation of speech triggers the highest level of judicial evaluation, "strict scrutiny." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 827-29 (1995) (content-based discrimination is presumptively unconstitutional); *Madsen v. Women's Health Center*, 512 U.S. 753, 790-91 (1994) (content-based regulations receive strict scrutiny); *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992) (content-based restrictions are subject to "exacting scrutiny," "strict scrutiny," requiring a showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (citations omitted); *cf. Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (for the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end). "Under strict scrutiny, the *Government*

must prove that applying [the act] to [the speech in question] furthers a compelling interest and is narrowly tailored to achieve that interest."[15]

Strict scrutiny is necessary here because this Court has already recognized that the "agency shop" itself infringes on the Nonmembers' First-Amendment rights, and that compelled speech results from the imposition of the "agency shop." *Ellis*, 466 U.S. at 455 ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights").

Indeed, this Court has repeatedly recognized the constitutional implications of the public-sector agency shop. *Abood v. Detroit Board of Education* held that compelling "contributions for political purposes works ... an infringement of ... constitutional rights." 431 U.S. 209, 234 (1977). It also recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," even when the union is engaged in bargaining and contract administration. *Id.* at 222.

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[15] *FEC v. Wisconsin Right to Life, Inc.*, — U.S. —, 127 S. Ct. 2652, 2664 (2007) (Roberts, C.J.) (original emphasis), *citing First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) ("Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, ...'the burden is on the Government to show the existence of [a compelling] interest'") (footnotes omitted); *cf. Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 473 n.16 (1997) (distinguishing between union forced dues cases and generic advertising program, with the latter "even less likely to pose a First Amendment burden").

As Justice Powell noted in *Abood*, "*any* withholding of financial support for a public-sector union is within the protection of the First Amendment," and "the State ... bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests." *Id.* at 255 (Powell, J., concurring in the judgment) (emphasis added). "Compelling a government employee to give financial support to a union in the public sector — regardless of the uses to which the union puts the contribution — impinges *seriously* upon interests in free speech and association protected by the First Amendment." *Id.* (emphasis added). Those principles are implicit in the Court's opinion in *Abood*, and were confirmed in later decisions.[16]

Abood held that public-sector forced fees are constitutionally valid only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232. It also recognized that "to compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment rights." *Id.* at 222.

Abood therefore held that nonmembers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political

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[16]Justice Powell's formulation of the principle was adopted in *Ellis*: "by allowing the union shop at all, we have already countenanced a *significant* impingement on First Amendment rights." 466 U.S. at 455 (emphasis added); *see also Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301 & n.8, 307 n.20 (1986) (repeated twice).

candidates and to express political views unrelated to its duties as exclusive bargaining representative," and for "other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 234-36. A constitutional line is drawn when "activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association." *Id.* at 236-37 & n.33.

Abood further established that First-Amendment strict scrutiny is required in deciding when nonmembers can be compelled to pay union fees. In holding that a union may not constitutionally expend compulsory fees for "ideological activities unrelated to collective bargaining," *Abood* relied upon decisions prohibiting government from infringing on free association or requiring relinquishment of First-Amendment rights as a condition of public employment unless a vital governmental interest is served directly and narrowly. *Id.* at 233-36.

The case cited most often in *Abood* was *Elrod v. Burns*, which recognized that, in public employment, "a significant impairment of First Amendment rights must survive exacting scrutiny." 427 U.S. 347, 362 (1976) (plurality opinion); *see also id.* at 363 (government means must be "least restrictive of freedom of belief and association"). Thus, implicit in the majority opinion in *Abood* is the principle that "even in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" 431 U.S.

at 259 (citing *Elrod*, 427 U.S. at 362, 381 (Powell, J., dissenting)).[17]

The "exacting scrutiny" standard was applied in *Ellis*. While arising under § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, *Ellis* applied a constitutional standard "to avoid the constitutional difficulty" raised by the argument that the disputed expenditures violated the First Amendment.[18]

In deciding whether particular union expenditures are constitutionally chargeable, *Ellis* said that the issue is whether they "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless

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[17]Although Justice Powell believed that patronage serves a compelling state interest, he agreed with the majority in *Elrod* and in a dissent in *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting), that it is—like state-coerced support of unions—unconstitutional unless the exacting test is met. Lower courts also have concluded that "[i]mplicit in Justice Stewart's opinion in *Abood* is the recognition that, when the government impinges on an individual's associational rights—either by prohibiting or compelling association—such action cannot be sustained unless it is justified by a compelling governmental interest." *Galda v. Bloustein*, 686 F.2d 159, 164 (3D CIR. 1982) (student fee case); *accord, e.g., Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11TH CIR. 1986) (mandatory bar dues).

[18]*Ellis*, 466 U.S. at 444-48 & 455-56; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring); *Lehnert*, 500 U.S. at 528 ("the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation") (Blackmun, J.), *citing Ellis*, 466 U.S. at 453, & *id.* at 555 ("there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule") (Scalia, J.).

adequately supported by a *governmental interest*." 466 U.S. at 455-56 (emphasis added). *Ellis* applied heightened scrutiny to all disputed activities that "have direct communicative content and involve the expression of ideas" (conventions, publications, organizing, and litigation). The Court then determined whether each activity directly served the governmental interest underlying § 2, Eleventh, *i.e.*, "to require all *members of a bargaining unit* to pay their fair share of the costs of *performing the function of an exclusive bargaining agent*." 500 U.S. at 446, 456 (emphasis added).

After *Abood* and *Ellis*, the Court next addressed these issues in *Lehnert*. There, the Court considered the chargeability of a number of categories of union expenditures, including most notably for purposes of this case, "bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit." 500 U.S. at 514.

However, in so doing, the Court was splintered. Justice Blackmun, writing for a four-Justice plurality, held that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

Rejecting a narrowly-focused bargaining-unit standard of chargeability of "non-political expenses," Justice Blackmun concluded "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with other-

wise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 500 U.S. at 524.

The Court justified this conclusion based upon its earlier holding in *Ellis* that unions may charge non-members for the costs of national conventions, by which it "maintain[s] its corporate or associational existence, ... elect[s] officers to manage and carry on its affairs, and ... consult[s] its members about overall bargaining goals and policy." 500 U.S. at 523, *quoting Ellis*, 466 U.S. at 448

However, Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, explicitly recognized extra-unit litigation as one of the exceptions to this general conclusion, also consistent with *Ellis*:

> This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities.

Id. at 528 (plurality opinion).[19] The plurality did so in recognition of "the important political and expressive nature of litigation."[20]

Similarly, Justice Scalia's partial concurrence in *Lehnert* explicitly relied upon *Ellis*' holding that extra-unit litigation is not chargeable and found that "there is good reason to treat *Ellis* 'as reflecting the constitutional rule.'" *Lehnert*, 500 U.S. at 555.

The free-speech implications of compelled-dues requirements were recognized again by this Court as recently as its last Term, in *Davenport v. Washington Educ. Ass'n*, ___ U.S. ___, 127 S. Ct. 2372 (2007). In *Davenport*, this Court addressed a challenge to a state statute (REV. CODE WASH. ANN. § 760) limiting the authority of unions to extract from nonmembers monies solely for limited political and ideological purposes. In a unanimous decision, the Court held constitutional a provision of state law protecting nonunion employees against collection and use of union

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[19]As previously noted, another narrow exception is lobbying for the ratification or implementation of a collective bargaining agreement in the dissenting nonmembers' bargaining unit. *See discussion supra* at p. 19. Like intra-unit litigation, such lobbying, although political speech, is permissibly charged to dissenting nonmembers because of its close relationship to bargaining for them, while other lobbying expenditures —including those for other bargaining units—are not. *Lehnert*, 500 U.S. at 519-22, 527 (Blackmun, J.), *see id.* at 559 (Scalia, J.).

[20]*Id.*, *citing Button*, 371 U.S. at 431 ("recognizing that for certain groups, 'association for litigation may be the most effective form of political association'"); *see also In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation is a form of petition and speech fully protected by the First Amendment).

dues for limited political purposes in the absence of their affirmative consent.

Davenport is important here because the Court unanimously rejected the notion that "this Court's agency-fee jurisprudence established a balance between the First Amendment rights of unions and of nonmembers." It reiterated that "unions have no constitutional entitlement to the fees of nonmember-employees." 127 S. Ct. at 2378-79. The Court rejected balancing in cases such as these, because the statutes involved grant unions an "extraordinary *state* entitlement to acquire and spend *other people's* money." *Id.* at 2380 (original emphasis).

Thus, although this Court has not explicitly applied "strict scrutiny" to union forced-fee exactions, this Court's general jurisprudence regarding compelled speech mandates explicit application of "strict scrutiny" in this context, and the Court should do so here.

IV. Since the Divided Decision in *Lehnert*, the Lower Courts Have Been Confused.

The confusion among the lower courts that have attempted to apply *Lehnert* demonstrates that, as Justice Scalia warned, *Lehnert* "obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." 500 U.S. at 550 (dissenting in part). Indeed, not fewer than six Justices recognized as much in *Board of Regents v. Southworth*, in which the Court declined to impose on students and universities

procedures like those applicable to forced union fees, commenting that:

> different Members of the Court reached varying conclusions [in *Lehnert*] regarding what expressive activity was or was not germane to the mission of the association. If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.

529 U.S. 217, 232 (2000).

This problem is reflected in much of the lower courts' post-*Lehnert* decisionmaking as to the chargeability of union expenditures. The lower courts' initial response was, in the main, to follow the *Lehnert* plurality's conclusion regarding extra-unit litigation expenditures.[21] Thereafter, one Circuit chose a different path.[22] Since then, two other Circuits— including

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[21] *PAID*, 938 F.2d at 1129-31 (extra-unit litigation nonchargeable); *Albro*, 585 N.E.2d at 673 (same); *Browne*, 485 N.W.2d at 388 (same); *see also Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295, 1303-04 (4TH CIR. 1993) (*en banc*) (Russell, J., dissenting) (dissenting from majority's holding that issue was not properly preserved for review and holding that "[i]n *Ellis* and *Lehnert*, the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ('extra-unit litigation') were not chargeable against the dissenter").

[22] *Reese*, 71 F.3d at 624; *but see Bromley v. Mich. Educ.*

(continued...)

the court below[23]—have applied *Lehnert*'s general test to evade *Ellis*' categorical and specific holding and treated an affiliate's extra-unit litigation expenditures as chargeable to nonmembers. *Otto v. Penn. Educ. Ass'n*, 330 F.3d 125, 135-39 (3D CIR. 2003).

Circuit Judge Silberman also has criticized the *Lehnert* test. Judge Silberman was dubious over the fact-finding exercise directed by his panel's majority in remanding a case, noting that "findings of fact are only useful if a court has available a legal framework into which to place those findings." He found such a framework lacking in *Lehnert*. *Beckett v. Air Line Pilots Ass'n*, 59 F.2d 1276, 1280-81 (D.C. CIR. 1995) (Silberman, J., concurring *dubitante*).

This case, therefore, presents an opportunity for this Court, applying the "strict scrutiny" standard in analyzing compelled speech, to both limit appropriately the categories for which a union may constitutionally compel contributions from dissenting employees, and to set a simple bright-line test facilitating nonmembers' efforts to protect their constitutional right against

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[22](...continued)
Ass'n, 82 F.3d 686, 695 (6TH CIR. 1996) (following *Reese*, but noting: "Whether the objecting employee can be required to contribute to the cost of such litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*").

[23]Initially, the First Circuit noted that *Ellis* held that "it was error to permit the union 'to spend compelled dues for its general litigation and organizing efforts.'" *Romero v. Colegio de Abogados*, 204 F.2d 291, 298 (1ST CIR. 2000) (*quoting Ellis*, 466 U.S. at 441). The panel below dismissed that comment as "*dicta*." Pet. App. A at 26a-27a n.15; 498 F.3d at 63 n.15.

compelled speech. *Cf. Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 307 n.20 (1986) ("the government and union have a responsibility to provide procedures that minimize that impingement [on First-Amendment rights] and that facilitate a nonunion employee's ability to protect his rights").

V. The Existing General Standard of *Lehnert* Fails to Protect Nonmembers' First-Amendment Rights with the "Least-Restrictive Means."

The Question Presented here is narrow relative to the broad questions considered in *Lehnert*. Nevertheless, consideration of *Lehnert*'s broad standard is a "subsidiary question fairly included" in the Question Presented, Rule 14.1(a), as the First Circuit's views regarding the standard set in *Lehnert* form the basis for its decision, and its error.[24]

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[24] *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005) (Ginsburg, J.) (considering question "inextricably linked to" question presented), *citing R.A.V. v. St. Paul*, 505 U.S. 377, 381, n.3 (1992), *Ballard v. C.I.R.*, 544 U.S. 40, 47 n.2 (2005) (same), *and* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 414 (8th ed. 2002) ("'Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.' (internal quotation marks omitted)"; *see also Medellin v. Dretke*, 544 U.S. 660, 685 n.2 (2005) (*per curiam*) (Court should have considered issue where "the correct, independent interpretation ... was the central question in the ... proceedings below") (O'Connor, J., dissenting).

In *Street*, the majority justified its holding upon the prediction that a remedy for the aggrieved nonmembers could be constructed with "a minimum of administrative difficulty." 367 U.S. 740, 774 (1961). But Justice Black correctly anticipated the difficulties that arise from compelled subsidization of union activities, and the burdens on nonmembers' rights caused by a remedy limited to a refund of expenditures adjudicated to be "nonchargeable":

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated. Undoubtedly, at the conclusion of this long exploration of accounting intricacies, many courts could with plausibility dismiss the workers' claims as *de minimis* when measured only in dollars and cents

Id. at 795-96 (Black, J., dissenting); *see also id.* at 778-79 (Douglas, J., concurring) (anticipating a "practical problem" in the relief ordered).[25]

Although this Court has categorically rejected Justice Black's concern about treating these questions as "*de minimis*,"[26] the *Lehnert* formulation effectively leaves nonmember employees virtually "in the dark," *Hudson*, 475 U.S. at 306, about the classification of properly chargeable union expenditures and unable to protect their constitutional rights. It also places nonmembers in the untenable position of litigating for years or decades seeking refunds of money that should never have been collected from them.[27]

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[25]As this Court has observed, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000); *cf. Tavernor v. Illinois Fed. of Teachers*, 226 F.3d 842, 850 (7TH CIR. 2000) (noting that nonmembers, while compensated for the loss of their funds by interest, cannot be compensated for "the transaction costs they incur in order to obtain it").

[26]*See Abood*, 431 U.S. at 234 n.31 (*quoting* James Madison, 2 *The Writings of James Madison* 186 (Hunt ed. 1901), and Thomas Jefferson, I. Brant, *James Madison: The Nationalist* 354 (1948)); *see also Hudson*, 475 U.S. at 305 & n.15.

[27]*See, e.g., Communications Workers v. Beck*, 487 U.S. 735, 739 (1988) (case filed in 1976; decided by this Court in 1988); *Pirlott v. NLRB*, — F.3d —, 2008 WL 1757545 at *2 (D.C. CIR. 2008) (pending for nearly nineteen years before National Labor Relations Board); *Belheumer v. Labor Relations Comm'n*, 432 Mass. 458, 463-64 (2000) (holding that 53-day hearing conducted over eight years was "reasonably prompt" under *Hudson*).

As the disarray among the lower courts demonstrates, the *Lehnert* formulation provides little guidance even for attorneys and judges. Consequently, it allows labor unions and their affiliates to burden nonmembers' First-Amendment rights and satisfy their avarice through creative accounting and shell-game-like shifting of nonmembers' funds among various affiliates. *Cf. Davenport*, 127 S. Ct. at 2380 n.2 (rejecting notion that union's "improvident accounting practices" justify unconstitutionality of statutory protection of nonmembers' rights).

Worse, the *Lehnert* formulation makes it virtually impossible for workers unschooled in the pilpulism of labor law and federal constitutional standards to assess whether a coerced union fee is properly calculated, even assuming a union's scrupulous compliance with *Hudson*'s disclosure requirements. *Cf.* 475 U.S. at 306-10.

In permitting unions to charge nonmembers for their "pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit," *Lehnert*, 500 U.S. at 524, the Court has heavily burdened "a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, for, at a minimum, he or she knows nothing about those units and their activities.

As Justice Black recognized, nonmember employees are ill-positioned and lack the resources to determine, for example, whether union expenditures made

far afield from their bargaining unit are "'germane' to collective-bargaining activity." *Lehnert*, 500 U.S. at 519. Can the Nonmembers truly be expected to track SEIU's myriad litigation and other activities in California and elsewhere?

VI. This Court Should Not Only Apply Its Existing Bright-Line Test for Extra-Unit Litigation, But Should Also Revise and Clarify the Standard for All Extra-Unit Expenditures.

The notion that "the costs associated with *otherwise chargeable activities* of [a union's] state and national affiliates," *Lehnert*, 500 U.S. at 524 (emphasis added), can ever meet the standard of being "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" *id.* at 519, is problematic in providing a structure for vindicating nonmembers' rights. The imperative that infringements on free speech be construed strictly through application of the least-restrictive means, *e.g. Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997), mandates that the infringement go no further than the purposes for which the infringement is intended.

That purpose is, of necessity, set forth in the enabling legislation. The only relevant "vital policy interest" is that limited to and expressed in the authorizing statute, which revolves around the bargaining unit. In this case, that legislation is Maine's State Employees Labor Relations Act, 26 ME. REV. STAT. ANN. § 979 *et seq.*

The authority granted to a "[b]argaining agent" under Maine law, 26 ME. REV. STAT. ANN. § 979-A(1), is not some grand scheme to spread the benefits and burdens of public-sector unionization broadly among the other forty-nine states of the Union. Maine obviously cannot tell other States how to order their individual labor relations with their own government employees.

The relevant authorizing legislation here does not even constitute a grand scheme to order public employee relations in Maine generally. The statute's focus is limited to individual bargaining units, 26 ME. REV. STAT. ANN. § 979-A(1),[28] as are the duties and burdens imposed upon those subject to the law. 26 ME. REV. STAT. ANN. § 979-D(1) (setting forth the obligation to bargain imposed upon "the public employer and the bargaining agent"). Clarification and narrowing of the standards for chargeability would do much to provide the "needed clarity" prayed for by Judge Lynch in her concurrence below. Pet.App. A at 41a; 498 F.3d at 69.

That is not to say, however, that the appropriate test begins and ends with examination of a State's statutory limits. This Court recognized last Term that there is a "constitutional floor for unions' collection and

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[28] "'Bargaining agent' means any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with employers, and which has been determined by the public employer as defined in subsection 5 or by the executive director of the board to be the choice of the majority of the unit as their representative." 26 ME. REV. STAT. ANN. § 979-A(1) (emphasis added).

spending of agency fees." *Davenport*, 127 S. Ct. at 2379. Any State statutory scheme must rise at least to the level of that constitutional floor.

Hence, legislative imposition of an exclusive bargaining representative could not exceed the oft-repeated formulation—for purposes of "collective bargaining, contract administration, and grievance adjustment," and "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues"—set forth in this Court's forced-dues cases. *See, e.g., Abood*, 431 U.S. at 225-26; *Ellis*, 466 U.S. at 448; *Beck*, 487 U.S. at 745 & 762-63 (*quoting Ellis*).[29]

Constitutional limits would be violated if a legislature were to attempt to appoint a monopoly-bargaining representative as a public (or private-sector) employee's agent for purposes of something as nebulous and broad as all "employment-related matters" across the nation, including, for example, lobbying Congress and that legislature.[30]

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[29]Under forced-dues provisions authorized by Federal law, the Court has likewise limited unions' authority to "the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with *the employer* on labor-management issues.'" *Beck*, 487 U.S. at 762-63, *quoting Ellis*, 466 U.S., at 448 (emphasis added). *Beck* limited chargeability to union activities related to "the employer," not every employer with whom a union—or its affiliates—have a collective bargaining relationship.

[30]For this reason, one element of the Blackmun plurality's criticism of Justice Scalia's "statutory duties" test in *Lehnert* is not well-taken. The Blackmun plurality thought that Justice Scalia's

(continued...)

As this Court has noted in identifying an interest that can justify coerced speech and association, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362.

The governmental interest for forced-dues arrangements was narrowly defined more than three decades ago, in *Abood*, as limited to the goal of "eliminat[ing] free riders—employees *in the bargaining unit* on whose behalf the union was *obliged* to perform *its statutory functions*, but who refused to contribute to the cost *thereof*." *Abood*, 431 U.S. at 221-22, 224 (emphasis added); *accord Ellis*, 466 U.S. at 447; *Street*, 367 U.S. at 764 & n.15.[31]

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[30](...continued)
"analysis turns our constitutional doctrine on its head. Instead of interpreting statutes in light of First Amendment principles, he would interpret the First Amendment in light of state statutory law." *Lehnert*, 500 U.S. at 526. The analysis of any compelled-dues requirement must begin with analysis of whether the statutory authorization is overbroad within the Court's constitutional First-Amendment framework. *See Street*, 367 U.S. at 749-50 (construing RLA to avoid constitutional issues); *Abood*, 431 U.S. at 220 (discussing the constitutional analysis in *Street*). Thus, Justice Scalia's test—while it limits chargeable costs to those within the union's statutory duties ("the state interest that can justify mandatory dues arises solely from the union's statutory duties."), is premised upon a valid constitutionally-limited statute in the first place. 500 U.S. at 553.

[31]The pejorative characterization of nonmembers as "free riders" ("a cynical opportunist capable of grabbing the benefits the union is compelled to extend without supporting the organization," John C. Moorehouse, *Compulsory Unionism and the Free-Rider Doctrine*, 2 Cato J. 619, 628 (1982)), has never received (continued...)

Indeed, *Abood* noted that Michigan's public-sector forced-dues statute "was specifically designed to authorize agency shops in order that 'employees in the bargaining unit ... share fairly in the financial support of *their* exclusive *bargaining* representative.'" 431 U.S. at 224 (*quoting* MICH. COMP. LAWS § 423.210(2)) (emphasis added). It was that limited interest alone that led the Court to hold that *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Street* were conclusive as to the constitutionality of the statute "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 U.S. at 223-32.

Abood's use of the phrase quoted above to describe "the costs of exclusive representation," *id.* at 229, was neither casual nor careless. Under the Michigan statute, unions are "the exclusive representatives of all

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[31](...continued)
serious scrutiny from this Court. Even presuming *arguendo* that union representation confers a benefit (the *Lehnert* plurality specifically disclaimed the need to show "some tangible benefit to the dissenters' bargaining unit," 500 U.S. at 522), in fact, monopoly bargaining—or "exclusive representation"—is a privilege for which unions lobby, and which they jealously guard. Charles W. Baird, *Toward Equality and Justice in Labor Markets*, J. Soc. Pol. & Econ. Stud. (1995) http://www.sbe.csuhayward.edu/~sbesc/labour.html (last visited 24 Apr. 2008) ("[I]t is disingenuous for unions to claim that exclusive representation is a burdensome requirement. They fought long and hard to get government to grant them the privilege of exclusive representation."). The implication that this is a "problem" foisted upon unions against their will is simply a myth. The "free-rider problem" is one of the unions' own creation. Union complaints about "free riders" are analogous to complaints about the high price of gasoline from buyers of gas-guzzling SUVs, and are equally unsympathetic.

the public employees *in [an appropriate] unit for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment or other conditions of employment" and must be permitted to participate in the adjustment of employee grievances. MICH. COMP. LAWS § 423.211 (emphasis added).[32]

Maine's statutory scheme is remarkably similar. Under the Maine statute, a union "has as its primary purpose the representation of employees in *their* employment relations with employers, and which has been determined by *the* public employer as defined in subsection 5 or by the executive director of the board to be the choice of the majority *of the unit* as their representative." 26 ME. REV. STAT. ANN. § 979-A(1) (emphasis added).

Similarly, collective bargaining is defined as the mutual obligation of "the public employer and the bargaining agent":

> [t]o confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, except that

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[32]Collective bargaining is defined as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement, and the execution of a written contract, ordinance or resolution incorporating any agreement reached.

MICH. COMP. LAWS § 423.215.

> by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession. All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining.

26 ME. REV. STAT. ANN. § 979-D.

The statute then provides a "laundry list" of "matters appropriate for collective bargaining," including "Wage and salary schedules ...; Work schedules relating to assigned hours and days of the week; Use of vacation or sick leave, or both; General working conditions; Overtime practices; Rules for personnel administration ...; Compensation system for [relevant] employees ...." *Id.*

Thus, the only functions the statute here imposes upon an exclusive representative are collective bargaining, contract administration, and grievance adjustment in the bargaining unit.

As under the Federal labor statutes, a union is an exclusive representative, and has a duty of fair representation, only for services that "gro[w] out of the collective bargaining relationship," not all "services that are employment-related."[33] Therefore, by defini-

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[33] *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 165-82 (1971) (Brennan, J.) (retirees' health benefits were not a mandatory subject of bargaining because those retirees were outside of the relevant bargaining unit); *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965) ("there is nothing in the labor policy [of the United States] indicating that the union

(continued...)

tion, there is no statutory obligation to perform any functions for, and no duty of fair representation owed to, anyone except the employees in one unit. *See Ellis*, 466 U.S. at 451-53; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375-76 & n.22 (1984).

Necessarily, then, under the First Amendment—and the RLA as construed to avoid constitutional difficulty—the test for chargeable expenditures is not and cannot be whether the activity relates to bargaining *somewhere* or that it *somehow* impacts on the Nonmembers' bargaining unit, no matter how attenuated that impact might be. Rather, it:

> must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative *of the employees in dealing with the employer on labor-management issues*. Under this standard, objecting employees may be compelled to pay their fair share of ... the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the

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[33](...continued)
and the employers in one bargaining unit are free to bargain about the wages, hours, and working conditions of other bargaining units or to attempt to settle those matters for the entire industry"); *see also National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1168-71 (D.C. CIR. 1986) (opinion by Bork, J.).

> duties of the union *as exclusive representative of the employees in the bargaining unit.*

Ellis, 466 U.S. at 448 (emphasis added); *accord Beck*, 487 U.S. at 762-63.

This standard might seem to be the test that the plurality led by Justice Blackmun rejected in *Lehnert*, 500 U.S. at 522, a conclusion with which Justice Scalia seemingly agreed. *Id.* at 561 ("I see no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage.").[34] When viewed through the prism of strict scrutiny, however, such non-existent, non-enforceable standards must fail.

Justice Scalia's doubt on this point illustrates the deficiency of this approach, as it leaves nonmembers with the Herculean task of monitoring those occasions when "requested assistance ... will not be forthcoming," and they will therefore "have cause to object to the charges," all concerning small amounts for each individual employee, and on a yearly basis. 500 U.S. at 561. It is impossible to reconcile this approach with a "narrow test" that removes the burden from the parties—nonmembers—most disadvantageously situated to vindicate their constitutional rights.

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[34]This comment seems inconsistent with Justice Scalia's basic concept that a union may charge "only for the costs of performing [its] statutory duties as exclusive bargaining agent." *Lehnert*, 500 U.S. at 550; *see also id.* at 532 n.6 (Blackmun, J.) (criticizing Justice Scalia's test because it was not "appl[ied] ... fully to the charges at issue in this case.").

Lehnert notwithstanding, a general "bargaining-unit only" standard is the only principled and consistent method of adjudicating the chargeability of union expenditures. It also is the only practical, workable method of providing useful, accessible (to the nonmembers forced to pay and monitor them), and understandable limits on compelled dues. It is the only test that can meet *Street*'s holding that the remedy must be constructed with "a minimum of administrative difficulty." 367 U.S. at 774.

As one comment on *Abood* pointed out, "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-97 (1977). The article concluded that, to reconcile *Abood* with *Street*, the line must drawn so that only "expenditures incident to the negotiation and administration of [the] specific contract" could be deemed chargeable. *Id.*

Unions have every incentive—and precious few disincentives—to exploit ambiguities in this Court's decisionmaking in order to increase their income from nonmembers. Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions*, 10 U. Penn. J. Bus. & Emp. Law 663, 694 (forthcoming 2008). That is certain to continue unless this Court clarifies a bright-line standard for chargeability.

Moreover, a "bargaining-unit standard" is actually Justice Scalia's "statutory duties" test, *Lehnert*, 500 U.S. at 550, with teeth, insofar as it takes cognizance of the constitutional limitations of authority and

responsibility necessarily inherent in Maine's and every collective-bargaining statute. As it now stands, *Lehnert*, with its three-part test and multiple opinions, has done little to provide predictable results, save for the predictable result that unions have self-servingly applied it and its ambiguities in a manner designed to maximize their income from nonmember employees.

In sum, this Court should use the opportunity provided by this case to correct the grievous error of the First Circuit in disregarding this Court's prior decisionmaking. Moreover, this Court should recognize that the First Circuit's effort to write its own exceptions to this Court's categorical rule arose out of a badly-splintered decision, and that application of dual standards to differing forms of extra-unit activities creates an untenable situation for nonmembers.

Clarification of these rules in a manner which comports with the Court's governing standards on compelled speech, and which will "facilitate a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, requires a strict bargaining-unit standard of measuring chargeable costs. Any other standard sacrifices individual rights to the whims of organizations that exercise the "extraordinary power," the "extraordinary benefit," "in essence, to tax government employees." *Davenport*, 127 S. Ct. at 2378. Due regard for the nonmembers' constitutional rights demands that the standard for exacting those forced dues be strictly and narrowly drawn.

CONCLUSION

At a minimum, this Court should reverse the judgment below as contrary to this Court's holdings in *Ellis* and *Lehnert*, that nonmembers may not lawfully or constitutionally be compelled to subsidize a union's extra-unit litigation. Petitioners respectfully suggest that the Court should also clarify the standard for the chargeability to nonmembers of union activities. The case then should be remanded for further proceedings consistent with the Court's decision.

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RESPONDENT'S BRIEF

98

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IN THE

Supreme Court of the United States

DANIEL B. LOCKE, *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,
Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION

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QUESTION PRESENTED

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 524 (1991), this Court held as a general rule "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit."

The question presented in this case is whether the costs of litigation conducted by a state or national parent union on behalf of its affiliated local unions constitute a categorical exception to that rule, such that costs incurred in litigation by a parent union that would be chargeable to objecting employees in the local bargaining unit directly involved must be charged solely to those employees, rather than being charged on a pro rata basis to objecting employees in all of the parent union's affiliated local union bargaining units that may potentially receive litigation assistance from the parent union.

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D. Bok & J. Dunlop, *Labor and the American Community* (1970)..... 16

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IN THE

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No. 07-610

DANIEL B. LOCKE, *et al.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,
Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION

STATEMENT OF THE CASE

1. Respondent Maine State Employees Association, SEIU Local 1989, Service Employees International Union ("MSEA," "MSEA-SEIU," or the "Union") is a labor organization that has been certified pursuant to the Maine State Employees Labor Relations Act, Me. Rev. Stat. Ann. tit. 26, § 979 *et seq.*, as the exclusive bargaining representative for approximately 10,000 employees in bargaining units of the

executive branch of the Maine state government. Joint Appendix ("JA") 105-106. MSEA is affiliated with a national labor organization, the Service Employees International Union ("SEIU"). JA 108. Petitioners are twenty current or former employees in the MSEA-represented bargaining units who have chosen not to become members of the Union.

The collective bargaining agreements ("CBAs" or "Agreements") between MSEA and the State of Maine Executive Branch applicable to petitioners during the time period involved in this case provided that bargaining unit employees who were not members of the Union would be required to pay to MSEA "a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract administration as defined by law." JA 97. Both Maine law and the First Amendment permit charging such a service fee to nonmembers, including those who object to paying dues or fees to the union. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Opinion of the Justices*, 401 A.2d 135 (Me. 1979). [1]

The CBAs provided that "MSEA-SEIU shall calculate the amount of the fee after the close of its annual

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[1] A fee in lieu of union membership dues such as is involved in this case is often referred to as an "agency fee" or "fair share fee." These terms generally refer to a fee charged to nonmembers in an amount equal to membership dues, and the lesser amount that is charged to *objecting* nonmembers then is referred to as the "reduced agency fee" or "reduced fair share fee." Because MSEA charges the reduced amount legally chargeable to objecting nonmembers to *all* nonmembers, *see infra* at 3, we will refer to what is in essence a "*reduced* service fee" simply as the "service fee."

audit, based on the expenditures reflected in the most recent available audited records." JA 99. "Once the audit is complete, MSEA-SEIU shall prepare a notice, consistent with applicable law, to all employees covered by this Agreement," which "shall include all information required by applicable law" concerning the determination of the amount of the fee to be charged to nonmembers. JA 100. The CBAs further provided that the amount of the fee "shall be subject to review pursuant to the American Arbitration Association's Rules for Impartial Determination of Union Fees," with MSEA responsible for paying the arbitrator's fee and the administrative expenses involved in the proceedings. JA 101-102. "Pending resolution of any such dispute, the disputed amount of the fees shall be placed in an interest-bearing escrow account." JA 101. *See also* JA 48-52, 59 (July 2005 notice to nonmembers, describing these procedures).

Although all nonmembers, and not only objecting nonmembers, paid the reduced amount of the service fee, MSEA determined the amount of the fee by examining its expenditures in light of the caselaw that defines what an *objecting* nonmember may constitutionally be required to pay. *See* JA 48, 53, 64, 97, 107-108.[2] By virtue of that caselaw, MSEA did not consider any expenditure that was not "germane to the Union's representation of nonmembers" to be

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[2] It is well established that if a nonmember has not made known to the union that he objects to paying a fee equal to full membership dues, the union is constitutionally permitted to require the individual to pay that full amount. *See Abood*, 431 U.S. at 235-41; *Davenport v. Washington Education Ass'n*, __ U.S. ____, 127 S. Ct. 2372, 2379 (2007). In effect, MSEA treats *all* nonmembers as having rights which, under the caselaw, need only be recognized for *objecting* nonmembers.

chargeable to nonmembers. JA 107. *See also* JA 53-58, 60-62 (July 2005 notice to nonmembers, explaining which kinds of expenditures MSEA treated as chargeable and which were treated as nonchargeable). Thus, for example, MSEA's expenditures on "[l]itigation or legal services related to the union's representational activities (i.e., grievances, collective bargaining rights, etc.) [were treated as] chargeable," JA 54, while "[o]ther litigation [wa]s considered nonchargeable," *id.*

For the period from July 1, 2005 through July 31, 2006, MSEA's analysis (based on examining its audited expenditures for calendar year 2004) resulted in a determination that 49.13% of its expenditures were legally chargeable to nonmembers.[3] JA 60. The service fee therefore was set at 49.13% of membership dues. JA 49.[4]

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[3] In making that determination MSEA followed the conservative course of treating certain expenditures as "nonchargeable" despite caselaw indicating that the expenditures could lawfully be categorized as "chargeable." For example, MSEA elected to "treat[ ] essentially all of its communications as non-chargeable," JA 54, even though the portions of its publications that reported on chargeable activities could lawfully be treated as chargeable, *id.* MSEA also treated as nonchargeable all of its expenditures on organizing notwithstanding that at least some of those expenditures could lawfully be treated as chargeable. JA 55. *See infra* note 14.

[4] For full time employees, this meant that the biweekly service fee charged to nonmembers was $8.94, as compared to the $18.20 that members paid in biweekly dues. JA 50. However, the CBAs provided that, throughout this period, nonmembers who had been hired prior to July 2, 2003 would be required to pay only half of the service fee. JA 97-98. This included all of the petitioners, *see* Pet. App. 4a, so their biweekly fee payments came to only $4.47, or approximately $9.00 per month. JA 50, 60.

MSEA's expenditures included the per capita affiliation fees the Union was required to pay to its parent union, SEIU. JA 58. To determine the portion of MSEA's affiliation fee payments to SEIU that would be treated as chargeable to nonmembers, MSEA relied on SEIU's determination of the percentage of SEIU's expenditures that were "necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of: . . . settling grievances and disputes . . . in arbitration, court or otherwise." JA 58, 62, 89. For the year in question, SEIU's determination was that 23% of its expenditures satisfied that chargeability standard. JA 64.[5] And, as petitioners note, in making that determination SEIU calculated that 56% of its expenditures on "Professional fees and expenses," including the "extra-unit litigation" expenses at issue here, satisfied that standard. *See* Pet. Br. 5.

In dollar and cents terms what the foregoing meant is this. MSEA's total 2004 expenditures were $4,541,650. JA 64. MSEA determined that, of the total, its chargeable expenditures were $2,056,103. *Id.* In making that determination, MSEA included $285,057 of the $1,269,247 MSEA paid to SEIU in affiliation fees as chargeable expenditures, based on SEIU's chargeable/nonchargeable determination, and treated the remaining $984,190 of MSEA's affiliation fee payments to SEIU as nonchargeable. *Id.* Of the $285,057 that was treated as chargeable, 12.08% (*i.e.*, $34,435) was attributable to SEIU's chargeable "Pro-

[5] The expenditures analyzed by SEIU were for calendar year 2003, which was the most recent year for which SEIU's expenditures had been audited. JA 53.

fessional fees and expenses," which included the SEIU "extra-unit litigation" expenses at issue here. Pet. App. 37a.

Thus, the chargeable portion of MSEA's affiliation fee payments to SEIU amounted to just under 14% of MSEA's total chargeable expenditures, and the portion attributable to SEIU's chargeable "Professional fees and expenses" amounted to just under 1.7% of MSEA's total chargeable expenditures. In other words, of the approximately $9.00 per month that petitioners paid in service fees, *see supra* note 4, approximately 15¢ per month was attributable to SEIU's expenditures on "Professional fees and expenses," including the "extra-unit litigation" expenses at issue here.

2. On July 12, 2005, MSEA mailed to all nonmember employees a notice (JA 48-104) concerning the service fee to be charged for the 2005-2006 period. Upon receipt of the July 2005 Notice, petitioners, who had filed suit in June 2004 challenging the legal adequacy of an earlier MSEA service fee notice covering the determination of the amount of the fee to be charged to nonmembers, filed an amended complaint (JA 26-47) against the July 2005 Notice.[6] In an Order on Motion for Preliminary Injunction (JA 8-25), and subsequently in an order on cross-motions for summary judgment (Pet. App. 42a-67a), Chief Judge Singal found in favor of MSEA on all claims.

The claim that petitioners pursued on appeal to the First Circuit, as relevant here, is that MSEA violated their rights as nonmember feepayers by including in its chargeable expenditures SEIU's expenditures, "re-

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[6] The July Notice superceded prior notices that had been issued for the 2005-06 period. *See* JA 48, 110-111.

gardless of the bargaining unit involved, for '[l]itigation or legal services related to the union's representational activities (i.e.: grievances, collective bargaining rights, etc.).'" Plaintiffs-Appellants' Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 10, 12. Petitioners' position was "a categorical one," Pet. App. 38a (Lynch, J., joining and concurring), that none of SEIU's litigation in a non-MSEA bargaining unit that was "related to the union's representational activities (i.e.: grievances, collective bargaining rights, etc.)" could be charged to nonmembers in the MSEA bargaining units. *See* Plaintiffs-Appellants' Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 19-25. According to petitioners, that is because "*all* extra-unit litigation [is nonchargeable]." Plaintiffs-Appellants' Reply Brief in *Locke v. Karass*, 1st Cir. No. 06-1747, at 7 (emphasis added).[7]

3. The First Circuit rejected petitioners' contention. The Court of Appeals explained that in *Lehnert*, this Court rejected the argument that objecting nonmembers "may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit," and held that the fee charged to nonmembers may include "their pro rata share of the costs associated with otherwise chargeable activities of [the local union's] state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." Pet. App. 17a-18a (quoting *Lehnert*, 500 U.S. at 522, 524). And, the First Circuit found no merit in petitioners' con-

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[7] Given the categorical nature of their claim, petitioners presented no evidence identifying or describing any of the litigation in which SEIU had engaged that had been included in the calculation of the service fee, and the record is silent in that regard.

tention that otherwise chargeable extra-unit litigation expenses by a parent union should be categorically excluded from *Lehnert*'s holding that otherwise chargeable parent union "extra-unit" expenses generally are chargeable pro rata to objecting nonmembers in all bargaining units of the parent union's affiliates.

Observing that "litigation is not susceptible to a single label," Pet. App. 30a, the court below recognized that "[s]ome litigation may be purely expressive, and therefore clearly outside the scope of chargeable activities," *id.* at 30a-31a, but that "other litigation may be central to the negotiation and administration of a collective bargaining agreement," *id.* at 31a, and therefore clearly *within* the scope of chargeable activities. Recognizing that Justice Blackmun's opinion in *Lehnert* would have treated "extra-unit litigation" as an exception to this Court's holding as to extra-unit expenses generally, the Court of Appeals pointed out that Justice Blackmun's view did not command a majority of the Court. Pet. App. 18a-21a, 30a. And the court below noted that *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), on which petitioners relied, did not address an affiliation fee resource-pooling arrangement for paying for litigation expenses such as was at issue in *Lehnert* and in this case. *See* Pet. App. 29a-30a.

Concurring, Judge Lynch stated that "[t]he First Amendment is not violated by allowing extra-unit litigation expenses to be charged according to the same criteria of germaneness as other extra-unit expenses," Pet. App. 38a, because such litigation expenses are "analytically identical" to other extra-unit expenses in terms of the principle established in *Lehnert*. *Id.*

Judge Lynch added that, if parent union extra-unit litigation is brought "to advance a political position"

or otherwise lacks a proper relationship to a local union's "collective bargaining duties," Pet. App. 39a, the litigation will be "exclude[d] . . . from the agency fee" of objecting nonmembers in other units because it will not meet the standard that determines whether a particular activity is chargeable at all. *Id.* But, to exclude from the service fee expenditures for litigation that is related to a local union's collective bargaining duties, merely because, during the particular year in question, the litigation was not conducted in a feepayer's own unit, "would result in significant practical detriment for both local and national unions." *Id.* It "would lead to reducing unions' ability to draw on funds for litigation related to collective bargaining," *id.* at 40a, and "[t]here would be a concomitant reduced capacity to bargain effectively on behalf of all employees," *id.*

SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education,*, 431 U.S. 209 (1977), this Court held that all employees in a bargaining unit represented by an exclusive bargaining representative, including those who do not join the union and have ideological objections to the union's collective bargaining agenda and/or its political/social agenda, may constitutionally be required to contribute to financing the union by paying membership dues or a service fee in lieu of dues, so long as the objecting nonmembers are not required to contribute toward the union's ideological activities unrelated to its duties as exclusive bargaining representative. In so holding, the Court recognized that the tasks performed by an exclusive bargaining representative in negotiating, administering and enforcing collective bargaining agreements "often entail the expenditure of much time and money," requiring

the services of lawyers and other experts, and that objecting nonmembers do not have a right to obtain the benefits of union representation as "free riders."

Local unions that act as exclusive bargaining representatives generally cannot afford to meet the costs of negotiating, administering and enforcing collective bargaining agreements on their own at each and every critical juncture in the process. It therefore is common for such local unions to be affiliated with a state, national and/or international "parent union" under an arrangement whereby the local unions, as a condition of affiliation, pay the parent a required affiliation fee and the parent union, out of those pooled affiliation fee resources, provides its affiliates collective bargaining assistance and support.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 524 (1991), this Court held that, under such a typical union affiliation arrangement, "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates [that is to say, activities that would be constitutionally chargeable to objectors in the unit that receives the direct benefits of the activities], even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit."

Contrary to petitioners' contentions, neither *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), nor *Lehnert* itself, holds that litigation expenses must be excluded from that rule. As Justice Kennedy noted in *Lehnert*, *Ellis* did not present the question "whether a local bargaining unit might choose to fund litigation . . . through a cost sharing arrangement under the auspices of the affiliate." And in *Lehnert*, while Justice Blackmun's plurality opinion

would have excluded litigation from the general rule adopted by the Court for "extra-unit" expenditures, that opinion did not command a majority and was criticized by other Members of the Court.

As the United States argues in its *amicus* brief, the logic of *Lehnert*'s general rule as to extra-unit expenditures is fully applicable to a parent union's expenditures on otherwise chargeable extra-unit litigation.

Litigation often is essential to the performance of a union's role as exclusive representative in the negotiation, administration and enforcement of collective bargaining agreements. For example, litigation may be necessary to compel an employer to engage in collective bargaining in the first place as required by law, or to comply with the resulting collective bargaining agreement. The costs involved in such litigation often are beyond the means of a local union. Hence, a parent union's expenditures, from pooled affiliation fee resources, in assisting affiliated local unions with such *otherwise chargeable* litigation are chargeable on a pro rata basis to objectors in all affiliated bargaining units for the same reason that the parent union's expenditures in assisting affiliated local unions with negotiating a collective bargaining agreement are chargeable.

To be sure, "union litigation may cover a diverse range of areas," *Lehnert*, 500 U.S. at 528 (plurality opinion), and some parent union extra-unit litigation is *not* "otherwise chargeable," because it is "political and expressive" in a way that is "akin to lobbying," *id.* Application of *Lehnert*'s general chargeablility rule to litigation would *not* require any objecting nonmember in *any* affiliated local union bargaining unit to provide funding for any political, ideological

or otherwise nonchargeable litigation, because the *Lehnert* chargeability rule is limited to parent union extra-unit expenditures on *otherwise chargeable* activities.

Petitioners argue that extra-unit litigation should be subject to a separate chargeability rule because litigation constitutes petitioning of the government. But this Court has refused to "elevate the Petition Clause to special First Amendment status." *McDonald v. Smith*, 472 U.S. 479, 485 (1985). In applying *Lehnert*'s teaching, there is no principled distinction between collective-bargaining-process litigation and the negotiation of a collective bargaining agreement with a government employer—which, as the Court recognized in *Abood*, often involves urging the government to take actions on controversial matters that run contrary to the beliefs of an objecting nonmember, but which unquestionably is an activity chargeable to objecting nonmembers nonetheless.

Unable to establish any basis for excluding litigation from *Lehnert*'s rule, petitioners ultimately argue that *Lehnert* should be overruled. We agree with the United States that that argument is not properly before the Court, as it is not fairly included within (indeed, it contradicts) the question presented in the petition for certiorari. In any event, the holding in *Lehnert* that is pertinent to this case—*viz.*, that parent union expenditures from pooled resources on otherwise chargeable activities may be charged to objectors in all of the parent union's affiliated local union bargaining units—was endorsed by every Member of the Court in *Lehnert*, and petitioners offer no reason for revisiting, much less for overruling, that holding.

Nor does this case present the question, posed only by the Government and not by the petitioners, as to

whether *Lehnert*'s holding should be limited to cases where there has been a showing that a parent union and its local union affiliates are parties to a "bona fide pooling arrangement" under which "each participating unit . . . ha[s] some reasonable assurance that, when needed, the pool will pay for its germane litigation." That argument by the Government as *amicus* is not properly before the Court, and is wholly lacking in merit in any event. Although the Government claims that the showing it proposes to require is mandated by *Lehnert*, the *Lehnert* Court approved the chargeability of parent union extra-unit expenditures at issue in that case without requiring any such showing. *Lehnert*'s holding covers unions, like the unions in that case and this one, that operate under a "unified-membership structure" with a typical "affiliation relationship." The holding is *not* confined to unions that operate under the heretofore unheard of "bona fide pooling arrangement" structure proposed by the Government.

ARGUMENT

I. *LEHNERT*'S GENERAL RULE ON THE CHARGEABILITY OF PARENT UNION "EXTRA-UNIT" EXPENDITURES FROM POOLED AFFILIATION FEES COVERS OTHERWISE CHARGEABLE LITIGATION EXPENDITURES

A. *Lehnert*'s General Chargeability Rule and Its Foundation

1. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that the First Amendment permits a public employer and a union acting as an exclusive collective bargaining representative to enter into a an "agency shop" collective bargaining

agreement requiring that all the employees covered by the agreement—including those who "may very well have ideological objections to [the union's] activities," *id.* at 222—must contribute to financing the union by paying union membership dues or a service fee in lieu of dues.

As the Court explained:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . .The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . . , union and non-union," within the relevant unit. . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Id. at 221-22 (citations omitted).

At the same time, the *Abood* Court concluded that objecting nonmember employees covered by an agency shop agreement "may constitutionally prevent the Union's spending a part of their required service fees

to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

Against that background the *Abood* Court added that the courts, in providing for the implementation of agency shop agreements, must "devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237. As to specifics, the *Abood* Court only went so far as to repeat, as the Court had stated in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963), that "[a]bsolute precision in the calculation of [the] proportion [of union expenditures an objecting nonmember must help finance] is not, of course, to be expected or required," and to admonish, as it had in *Allen*, that courts should not impose on unions obligations "which appear[ ] likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." *Abood*, 431 U.S. at 239 n.40 (quoting *Allen*, 373 U.S. at 122).

Thereafter, in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986), the Court filled in the specifics left open in *Abood* by holding that a union satisfies its First Amendment obligation to objecting nonmembers by charging those nonmembers a service fee set at a percentage of the dues paid by the union's members, equal to the percentage of the union's expenses—which may be "calculate[ed] . . . on the basis of its expenses during the preceding year," *id.* at 307 n.18—that are for activities constitutionally chargeable to objectors. *See id.* at 306-07. In articulating that requirement, the Court recognized

once again "that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.* at 407 n.18 (quoting *Abood*, 432 U.S. at 240 n. 40, and *Allen*, 373 U.S. at 122).

2. As the Court recognized in *Abood*, effective local union negotiation, administration and enforcement of collective bargaining agreements "often entail[s] . . . [t]he services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." *Abood*, 431 U.S. at 221. Given their limited size and limited resources, local unions that act as exclusive collective bargaining representatives normally cannot provide, or afford to provide, for such services on their own at each and every critical juncture in the process of negotiating, administering and enforcing collective bargaining agreements. It therefore is common for such local unions to be affiliated with a state, national and/or international union (*i.e.*, a "parent union") under an arrangement whereby the local unions, as a condition of affiliation, pay the parent a required affiliation fee, generally on a per capita basis, and the parent union, out of those pooled affiliation fee resources, provides its affiliates collective bargaining assistance and support.[8]

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[8] *See, e.g.*, M. Estey, *The Unions: Structure, Development, and Management* 74 (3d ed. 1981) (noting that "the growing complexity of collective bargaining problems . . . has led unions, like their business counterparts, to make increasing use of staff specialists—economists, lawyers, accountant, etc.," and that "[t]he sheer expenses of maintaining such staff is beyond the resources of most local unions; . . . only national unions can afford it"); D. Bok & J. Dunlop, *Labor and the American Community* 150-151,153-154 (1970) (discussing the importance of "economies of scale" to effective union representation).

This common affiliated union structure naturally raises the question whether, in determining the service fee to be paid by a local union's objecting nonmembers, the local union's affiliation fee payments to its parent union are to be treated as a chargeable expenditure in whole or in any part. In *Lehnert* this Court answered that question in the following terms:

> We . . . conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. [500 U.S. at 524.]

By the critical phrase "otherwise chargeable activities" the *Lehnert* Court referred to activities that are chargeable to the objecting employees in the bargaining unit that receives the direct benefit of the activities. And *Lehnert* states a three-pronged test to determine when an activity is thus "otherwise chargeable": the activity must be "(1) . . . 'germane' to collective-bargaining activity; (2) . . . justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

In holding that parent union "costs associated with otherwise chargeable activities" may be charged on a pro rata basis to objecting nonmembers in all bargaining units of the parent union's affiliated local unions, *Lehnert* began by noting that the Court had "never . . . require[d] a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," *id.* at 522, because "to

require so close a connection would be to ignore the unified-membership structure under which so many unions . . . operate," *id.* And, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them," *id.* at 523, it followed that "that part of a local's affiliation fee which contributes to the [parent union's] pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year," *id.*

As the United States observes, the Court in *Lehnert* was unanimous on the proposition that a local union that pays its required affiliation fee to a parent union may properly "charge objecting employees for their pro rata share of the costs associated with [the parent's] otherwise chargeable activities" for all of its affiliated local units. Brief for the United States as Amicus Curiae ("U.S. Br.") at 17-18 (quoting *Lehnert*, 500 U.S. at 54 (opinion of the Court)). *See also Lehnert*, 500 U.S. at 562 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing that otherwise chargeable expenses of a parent union may be charged to all affiliates, because "[i]t is a tangible benefit . . . to have . . . services on call, even in the years they are not used"); *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid consulting or legal services plan").

The *Lehnert* rule gives proper recognition to the benefits that a local union obtains from paying an

"affiliation fee which contributes to the [parent union's] pool of resources," *id.* at 523, in the form of access to those pooled resources which would not otherwise be available to the local union when needed to effectively negotiate, administer or enforce the local's collective bargaining agreements. In years when the parent union provides such assistance, doing so may entail the expenditure of very substantial amounts per employee. If the parent union were not permitted to spread those costs over the employees in all of the bargaining units represented by all of its affiliated local unions, each employee in the local bargaining unit that received the assistance would have to pay a very large amount in a single year, far in excess of the employee's normal local union dues or service fee.

The United States correctly points out that "[t]hat approach could cause fees to fluctuate wildly from year to year . . ., because a unit might have low . . . costs in most years, but . . . costs might spike in certain years, such as when a strike occurs." U.S. Br. 15-16. In fact, the "spikes" resulting from such a "pay as you go" system might easily be so high as to be prohibitive, with the result that the local union might find itself unable to muster the resources needed for effective representation of the bargaining unit. Thus, as the United States aptly puts it, "a unit-by-unit funding mechanism imposes financial risks on members and nonmembers alike," U.S. Br. 16, whereas "[e]ven objectors may benefit from spreading out . . . costs rather than facing a substantial assessment in a single period," *id.* at 20.

Only by ignoring that fundamental point can petitioners complain that the *Lehnert* rule forces nonmembers "to subsidize . . . activities for unions and bargaining units far afield from their own," Pet. Br.

20, and constitutes "some grand scheme to spread the benefits and burdens of public sector unionization broadly among [all of the] states of the Union," *id.* at 44, through "creative accounting and shell-game-like shifting of nonmembers' funds among union affiliates," *id.* at 42. A person might as reasonably complain that, in years when she needs no medical services, her premium payment for a medical insurance policy provides her nothing of value and forces her to "subsidize" medical services for others as part of a "grand scheme" to spread healthcare into every state through "shell-game-like shifting of funds among various [policyholders]."

By holding that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with *otherwise chargeable* activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit," 500 U.S. at 524 (emphasis added)—but *not* for the costs associated with a parent union's *nonchargeable* activities in other bargaining units—*Lehnert* fully protects the First Amendment rights of objecting nonmembers. For the service fee each objecting nonmember pays includes only his pro rata share of the local union's payment to the parent for the availability of assistance from the parent union on the local union's *chargeable* activities, and does *not* include a pro rata share of the local union's payment for the availability of assistance from the parent union on the local union's *non*chargeable activities. *See* U.S. Br. 25.[9]

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[9] To be sure, in an affiliation relationship, a local union does not have a guarantee that, in any particular year, it will receive assistance from the parent union at a level of cost equal to the

B. *Lehnert*'s General Chargeability Rule Properly Applies to Litigation Expenditures

There is no opinion for the Court in *Lehnert* as to whether a parent union's litigation expenditures for and on behalf of its affiliated local unions from pooled resources generated by the local unions' affiliation fees are governed by *Lehnert*'s rule as to the chargeability of such parent union expenditures generally. But as the United States correctly observes—and as we will elaborate—"the logic of *Lehnert* strongly suggests that using compelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses." U.S. Br. 20-21.

1. Given petitioners' insistence that this Court held such pooled litigation expenditures to be nonchargeable both in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984), and in *Lehnert* itself, we pause at the outset to show that neither case so held.

a. As Justice Kennedy stated in *Lehnert*, "*Ellis* . . . contains no discussion of whether a local bargaining unit might choose to fund litigation . . . through a cost sharing arrangement under the auspices of the affili-

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local's affiliation fee payments. But under *Hudson*, since a local union's service fee for objecting nonmembers is based on its expenditures for a prior year, *see supra* at 15, there is never a guarantee that, in any given year, the service fee paid by an objector will correspond to the costs of the chargeable activities in which the local union engages in the year for which the fees are paid. This may cause some objectors "[to] feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Lehnert*, 500 U.S. at 525 (quoting *Ellis v. Brotherhood of Ry. Clerks*, 416 U.S. 435, 456 (1984)).

ate." *Lehnert*, 500 U.S. at 564 (opinion of Kennedy, J.). *See* Pet. App. 27a-28a (making the same point); *Otto v. Pennsylvania State Educ. Ass'n*, 330 F. 3d 125, 136 (3d Cir. 2003) (same). And the reason there was no such discussion is that *Ellis* did not present that issue. The issue presented in *Ellis* was whether the specific litigation there, which did not in terms concern the objectors' bargaining unit, nonetheless conferred a sufficient direct benefit on that unit to be properly chargeable to those objectors.[10] And the *Ellis* Court's ruling was that the "extra-unit" litigation there did not confer a sufficient direct benefit on the objectors' bargaining unit to be chargeable on that basis. *See Ellis*, 466 U.S. at 453.

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[10] *See* Brief for Respondents, *Ellis v. Brotherhood of Ry. Clerks*, O.T. 1983, No. 82-1150, at 31 (arguing that "[i]t is relatively rare that labor litigation has consequences for this train or this air line only," and that the union's litigation concerning the legality of an airline industry mutual aid pact "affected the Union's bargaining strength *vis-à-vis all* air carriers") (emphasis in original). Furthermore, in discussing the litigation expenditures at issue in *Ellis*, the Court determined only "whether *the statute* [that is, the Railway Labor Act] permits the union to charge [objecting nonmembers] for any of the challenged expenditures." 466 U.S. at 445 (emphasis added). The court addressed *constitutional* issues in Part VI of the opinion in *Ellis* "only . . . with regard to the three activities for which [the Court] held [the statute] allows the union to use [objectors'] contributions." *Id.* at 455. *See also id.* at 458 (Powell, J. concurring in part and dissenting in part) ("The First Amendment . . .is not the basis for the Court's decision except to the extent this was addressed in Part VI"). Litigation expenses were not addressed in Part VI of the opinion in *Ellis*, so *Ellis* does not constitute a First Amendment holding as to such expenses. Nevertheless, if *Ellis* were regarded as a statement of First Amendment law, it remains the case that *Ellis* did not involve the question presented here.

b. Nor did the Court hold in *Lehnert* that parent union "extra-unit" litigation expenses from pooled affiliation fee resources are not chargeable as a categorical matter. To be sure, four Justices did espouse that view, *see* 500 U.S. at 528 (plurality opinion), but on grounds that do not bear up under scrutiny, *see* pp. 25-35 *infra;* and none of the other Justices joined in the plurality opinion on this point or expressed agreement with it.

Justice Kennedy expressly disagreed with the plurality, stating that "remov[ing] litigation . . . from . . . the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions . . . makes little sense if we acknowledge, as Justice Scalia articulates . . . , that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but not contractual consulting or legal services plan." *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part.)

And, as the United States notes and as is evident from the foregoing statement of Justice Kennedy (who joined Justice Scalia's separate opinion in *Lehnert*), "Justice Scalia's reasoning *supports* the use of compelled fees for litigation pooling arrangements; it certainly does not *preclude* such use." U.S. Br. 22 (emphasis in original). For Justice Scalia stated in his *Lehnert* opinion that the majority's analysis of the pooling principle was "correct," 500 U.S. at 561 (Scalia, J., concurring in the judgment in part and dissenting in part), because "[i]t is a tangible benefit . . . to have expert consulting services on call, even in the years when they are not used." *Id.* at 562. As Justice Kennedy

noted, that analysis is fully applicable to a parent union's litigation services.[11]

2. The United States is correct in stating that "[under] the logic of *Lehnert* . . . using compelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses." U.S. Br. 20-21.

The first element of *Lehnert*'s logic is the Court's recognition that affiliation fees paid by a local union to a parent union, insofar as those fees "contribute[ ] to the pool of [parent-union] resources potentially available to the local," *Lehnert*, 500 U.S. at 523, are "assessed for the [local union's] bargaining unit's protection, even if . . . not actually expended on that unit in any particular membership year," *id.* And the second element of *Lehnert*'s logic is the Court's recogni-

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[11] Petitioners make an unavailing effort, Pet. Br. 27, to press into their service Justice Scalia's statement that "[*IAM v.*] *Street*, [367 U.S. 740 (1961),] *Ellis*, and [*Communications Workers v.*] *Beck*, [476 U.S. 735 (1988)] were statutory cases, but there is good reason to treat them as merely reflecting the constitutional rule suggested in [*Railway Employees' Dept. v.*] *Hanson*, [351 U.S. 225 (1956)] and later confirmed in *Abood*." *See Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part). That statement has nothing to do with the question presented here, which, as we have shown, was not presented in *Ellis*, and which petitioners do not even suggest was presented in the other cases cited by Justice Scalia (*Street*, *Beck*, *Hanson* and *Abood*). Justice Scalia cited those cases in addressing the entirely *separate* question as to whether, instead of the three-pronged test adopted by the Court in *Lehnert*, *see supra* at 17, chargeability should depend on whether an expenditure was incurred in "performing the union's statutory duties as exclusive bargaining agent." *Id.* at 550 (Scalia, J., concurring in the judgment in part and dissenting in part). That question is not presented for decision in this case. *See infra* at 38.

tion that this "protection" for a local union's bargaining unit is properly chargeable to objectors in that unit *as long as it covers parent union assistance that is in the form of "otherwise chargeable expenditures," id.* at 524, that is to say, assistance to a local union in an activity related to collective bargaining that benefits that local union's bargaining unit and is properly chargeable to the objecting nonmembers in that unit. The upshot is this: because (for example) it would be a chargeable expenditure for an affiliated local union to hire a professional negotiator to assist the local in negotiating a collective bargaining agreement, it likewise is a chargeable expenditure for an affiliated local union to pay to a parent union the portion of its required affiliation fee that goes to enabling the parent union to hire negotiators to assist affiliated local unions with their collective bargaining. The chargeable portion of the affiliation fee is determined by the sum of the parent union's expenditures on such *otherwise chargeable* activities; no expenditures on *non*chargeable activities are included.

In applying that rule, parent union extra-unit litigation *that is in fact "otherwise chargeable"* is "analytically identical," Pet. App. 38a (Lynch, J., joining and concurring) to other chargeable parent union extra-unit activities insofar as *Lehnert*'s chargeability rule is concerned. If the expenditures for a particular kind of litigation—for example, litigation to enforce provisions of a local union's collective bargaining agreement that the parent union assisted the local in negotiating—would be chargeable to objectors in a particular local bargaining unit when and if such litigation were to be conducted on behalf of that unit, then the potential availability of parent union assistance with respect to such litigation is a chargeable benefit to the objectors' unit in precisely the same way and

for precisely the same reasons as the potential availability of parent union assistance with respect to negotiating the collective bargaining agreement in the first place is a chargeable benefit.

3. In arguing that parent union extra-unit litigation expenditures should be categorically excluded from *Lehnert*'s rule as to parent union extra-unit expenditures generally, petitioners do *not* assert that litigation expenses are never "otherwise chargeable." On the contrary, petitioners have not disputed that *all* of the SEIU litigation that was considered chargeable by SEIU and MSEA—which was undertaken "for the purpose of assisting local unions and councils in the performance of their duties as a representative of the employees in dealing with the employer on labor management issues, including the costs of . . . settling grievances and disputes . . . in arbitration, court or otherwise," *see supra* at 5—was properly chargeable to objecting nonmembers in the local union bargaining units on whose behalf the litigation was conducted.[12]

Such litigation is, after all, at the core of the union activities that *Abood* recognizes as chargeable to objectors: "[t]he tasks of negotiating *and administering* a collective-bargaining agreement and representing the interests of employees in *settling disputes and processing grievances*." *Abood*, 431 U.S. at 221 (emphasis

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[12] Petitioners' challenge relates solely to litigation conducted "for bargaining units far afield from the [petitioners'] State of Maine bargaining units." Pet. Br 9. Thus this case does not raise any challenge to the chargeability, on a pro rata basis to objecting employees in all of a parent union's affiliated local union bargaining units, of the parent union's expenditures on litigation that does not pertain to any specific local union's bargaining unit—for example, litigation to enable the parent union to "maintain its corporate or associational existence," *Ellis*, 466 U.S. at 448.

added). If a local union is to perform those tasks successfully, it must have both the means to negotiate effectively with the employer that comes to the bargaining table *and* the means to compel the employer, through litigation before an agency or a court, to come to the table and bargain in good faith when the employer has unlawfully refused to do so,[13] and to compel the employer, again through litigation, to arbitrate a grievance arising under the collective bargaining agreement and to abide by the arbitrator's award. In many cases a local union that lacked the capacity to bring and prosecute such collective-bargaining-process litigation would lack the capacity to be an effective exclusive bargaining representative. Such litigation is unquestionably chargeable to objectors in the local bargaining unit where it is conducted. Nor do petitioners argue otherwise.

But, securing "[t]he services of lawyers," *Abood*, 430 U.S. at 221, for such collective-bargaining-process litigation may be totally beyond the means of a local union, or may require the local union to raise its membership dues and service fee to a prohibitive level on an emergency basis. *See supra* at 16, 19. Consequently, were it not for the potential availability of assistance from the parent union for such litigation,

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[13] *See, e.g.*, Me. Rev. Stat. Ann. tit. 26, § 979-C.1.E (prohibiting public employers from "[r]efusing to bargain collectively with the bargaining agent of its employees as required by section 979-D"); *id.* § 979-D (defining the duty to bargain to include, *inter alia*, the duty to negotiate in good faith and to participate in good faith in the mediation, fact finding and arbitration procedures required by the statute to resolve bargaining impasses); *id.* §§ 979-C.3, 979-H (conferring on the Maine Labor Relations Board the authority to adjudicate complaints of violations of those provisions, subject to judicial review).

many local unions would go into collective bargaining negotiations as neuters—and with the employer fully aware of their impotence.

Thus, resource pooling through local union affiliation fee payments to a parent union to finance otherwise chargeable litigation activity stands on the same footing, as a matter of logic and First Amendment principle, as resource pooling through affiliation fee payments to a parent union to finance other kinds of otherwise chargeable activities. Indeed, because litigation is such an expensive activity, and one that cannot be conducted by non-lawyer union representatives, Judge Lynch was correct in observing below that, if litigation expenditures were excluded from *Lehnert*'s general chargeability rule as to "extra-unit" parent union expenses, the result would be "a concomitant reduced capacity to bargain effectively on behalf of all employees." Pet. App. 40a.[14]

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[14] Because MSEA relies solely on *Lehnert*'s cost-pooling holding as just described and has not attempted to establish that any particular litigation in which SEIU engaged was "for the direct benefit of" the MSEA units, *id.*, "[t]his case presents no occasion to consider [how] a unit may establish a direct interest in litigation involving other parties." U.S. Br. 11 n. 2. It therefore is gratuitous for the United States to declare that "[t]he fact that one unit's litigation may create a precedent that could affect other units is insufficient to establish that the litigation directly concerns those units." *Id.* *See also id.* at 12 (repeating this assertion). It also is wrong. For example, if two units were engaged in similar disputes with their respective employers over the meaning of language that was identical in their respective CBAs, and one of the units engaged in successful litigation over the question, the other unit might find it unnecessary to litigate because the employer might accede to the result reached in the first unit's litigation. In such a situation—and there are many others—both units would properly be understood as having a direct interest in the litigation.

4. With respect to parent union litigation in connection with the collective bargaining process such as we have described, the statement in the *Lehnert* plurality opinion on which petitioners rely—that extra-unit litigation is so "political and expressive" in nature as to be "akin to lobbying in both kind and effect," 500 U.S. at 528—is simply incorrect. Such litigation is no more "political and expressive" or "akin to lobbying" than the plainly chargeable activity of negotiating the very collective bargaining agreement that is the subject or the object of the litigation.

To be sure, "union litigation may cover a diverse range of areas," *id.*, and some of that litigation may correctly be deemed to be so "political and expressive" in nature and "akin to lobbying" as to be nonchargeable. But as Judge Lynch explained in her concurring opinion, the parent union expenditures for such litigation would be "exclude[d] . . . from the agency fee" at the threshold. Pet. App. 39a. For such litigation expenditures would be nonchargeable to objectors in the units directly involved in the litigation and thus would not constitute "otherwise chargeable"

And, because both MSEA and SEIU treated organizing expenditures as *nonchargeable, see supra* note 3, this case likewise does not present any occasion to address the chargeability of *organizing* expenditures, despite the apparent desire of the petitioners (*see* Pet. Br. 23-24) and the United States (*see* U.S. Br. 13) to do so. We merely note that, in contrast to *Ellis*, where the Court found that the organizing expenses at issue in that case were not chargeable under the Railway Labor Act, 466 U.S. at 452, the NLRB, in a decision affirmed unanimously by the Ninth Circuit en banc, has held that under the National Labor Relations Act expenses for certain kinds of organizing, different from what was involved in *Ellis*, are properly chargeable to objecting nonmembers. *UFCW Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002) (en banc), *enforcing* 329 N.L.R.B. 730 (1999).

expenditures that could be included in calculating the portion of the affiliation fee to be charged to objecting nonmembers in other bargaining units.[15]

This case does not present any occasion to determine which kinds of litigation are "otherwise chargeable." Petitioners did not dispute—and could not reasonably have disputed—that the litigation SEIU treated as chargeable in determining the chargeable portion of its affiliation fee was in fact "otherwise chargeable." Petitioners' claim was and is that extra-unit expenditures for "otherwise chargeable" litigation cannot be charged to objecting nonmembers in any bargaining unit other than the unit directly involved in the litigation. That submission is due to be rejected as a matter of law.

5. Petitioners' argument that "the Nonmembers' employment interests are not advanced by . . . litigation [in other units]," Pet. Br. 20, is refuted by *Lehnert,* which recognizes that the *availability* of parent union assistance to affiliated local unions in the collective bargaining process advances the interests of all employees, including objecting nonmembers, in all of the bargaining units of the affiliated local unions, even in years where such parent union assistance is not provided to a particular unit. Nor

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[15] Litigation is not unique in lending itself to both chargeable and nonchargeable expenses. A union publication, for example, may be devoted in part to reporting on collective bargaining and in part to political topics. *Lehnert* holds that the expenses attributable to the portion of the publication that reports on chargeable matters is chargeable, while expenses attributable to the portion of the publication that reports on nonchargeable matters is nonchargeable. *Lehnert*, 500 U.S. at 527 (opinion of the Court). There is no reason why litigation alone should be subjected to a categorical rule that ignores the nature of the litigation in which a union has actually engaged.

does petitioners' concern that expenditures on "extra-unit litigation might well *directly conflict* with . . . [an objecting nonmember's] interests . . . as a citizen, taxpayer, and/or competitor for scarce public resources," Pet. Br. 20 (emphasis in original), provide any basis for the categorical "litigation exception" they propose. As this Court recognized in *Abood*, a local union's negotiation and administration of collective bargaining agreements in the objector's own unit may often raise such a conflict, and such activity is nonetheless chargeable. *See Abood*, 431 U.S. at 233.[16]

6. Petitioners argue that the parent union extra-unit litigation expenditures at issue here must be treated differently from the parent union expenditures made chargeable by *Lehnert* in terms for the

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[16] The *Abood* Court, in upholding the constitutionality of union shop agreements that, at their core, require objecting nonmembers to finance the union's negotiation of a collective bargaining agreement covering the objectors' bargaining unit, noted that:

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. [431 U.S. at 222.]

"simple" reason that "litigation is petitioning of government protected by the First Amendment." Pet. Br. 15. But that does not serve to provide a legal distinction between the two. This Court has refused to "elevate the Petition Clause to special First Amendment status," *McDonald v. Smith*, 472 U.S. 479, 485 (1985), because "there is no sound basis for granting greater constitutional protection to statements made in a petition to the [government] than other First Amendment expressions," *id.* *See also Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) (holding that a mandatory state bar could constitutionally charge objectors for "germane" activities that consisted principally of presenting recommendations to the courts).

This Court's recognition that petitioning activity is not on some plane above other First Amendment activities is dispositive of petitioners' argument. Assuming that petitioners are correct that negotiating a collective bargaining agreement in the public sector does not constitute "petitioning of government protected by the First Amendment," Pet. Br. 15—a proposition that is not self-evident[17]—it nevertheless is the

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[17] Public sector collective bargaining consists of asking government officials to take action. And in Maine, if collective bargaining by state employees has not resulted in an agreement between a union and management's negotiators, other public agencies become involved. Fact-finding may be conducted under the auspices of the Maine Labor Relations Board, *see* Me. Rev. Stat. tit. 26, § 979-D.3; and if fact-finding does not resolve the dispute, "either party may petition the board to initiate compulsory final and binding arbitration," selecting an arbitrator through a process administered by the Labor Relations Board, *id.* § 979-D.4(B). Most states follow similar procedures. *See generally* Elkouri & Elkouri, *How Arbitration Works* 1366-1391 (A. Ruben, ed. 2003). Such a collective bargaining process is indistinguishable from petitioning activity. Indeed, it closely resembles litigation.

case, as this Court stated in *Abood*, that collective bargaining frequently involves controversial matters, often of public policy, as to which employees may have differing views. *See supra* at 31 and note 16. Indeed, determining what a union will seek from the government in collective bargaining generally involves *greater* room for ideological disagreements than, say, determining whether to enforce a provision of an existing collective bargaining agreement by bringing an action to compel arbitration or to enforce an arbitrator's award. *Lehnert* establishes that a nonmember's disagreement with the parent union's bargaining agenda, even as regards bargaining in other units, does not give the nonmember a First Amendment right not to pay a pro rata share of the national union's bargaining expenses. There is no logical reason why the result should be different with respect to "extra-unit" litigation in support of a union's bargaining efforts or to enforce a collective bargaining agreement.

That there is no meaningful distinction, in determining which parent union expenses may be charged to objecting nonmembers, between activities that involve petitioning the government and those that do not, is further borne out by the fact that a particular kind of activity in which a union engages in negotiating or enforcing a collective bargaining agreement may sometimes involve proceedings before the government and sometimes not, even though the nature of the activity is the same in both instances. For example, a state-employee union in Maine may provide in its CBA that grievances will be arbitrated before a private arbitrator, *see* Me. Rev. Stat. Ann. tit. 26, § 979-K, but if the CBA does not so provide, the grievance will be heard by the State Civil Service Appeals Board, *id.* *See also* Me. Rev. Ann. tit. 26, § 7083

(describing the Board's procedures). It would make no sense to treat a parent union's assistance in grievance resolution as chargeable on a cost-pooling basis in the one case but not the other.

Furthermore, petitioners do not suggest that, as to activities *within* the unit, litigation is subject to different rules than other activities, no matter how strongly a nonmember may disagree with particular litigation. If the fact that litigation entails petitioning the government does not require a special rule when the litigation involves a nonmember's own unit, there is no reason why a special rule confined to litigation expenses should be required in applying *Lehnert*'s holding as to "extra-unit" expenditures.[18]

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[18] Petitioners assert that the *Lehnert* Court, in holding that lobbying for ratification or implementation of a collective bargaining agreement is chargeable to objectors, allowed chargeability only as to such lobbying with regard to a nonmember's own collective bargaining agreement. *See* Pet. Br. 19, 24-25. That is not a correct reading of *Lehnert*. The passages to which petitioners refer are in Parts III-A and IV-A of Justice Blackmun's opinion, 500 U.S. at 522, 527 (*see* Pet. Br. 19) which were not part of the opinion of the Court. *See id.* at 511. To the extent that other Members of the Court understood the plurality opinion as proposing that expenses for otherwise chargeable lobbying should not be chargeable on an "extra-unit" basis, they did not agree with that position. On the contrary, Justice Kennedy stated that it "makes little sense" "[for] Justice Blackmun [to] remove[ ] litigation *and lobbying* from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with 'otherwise chargeable' expenses of affiliate unions." *Id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). Justice Kennedy added that such a holding would be inconsistent with the analysis in Justice Scalia's opinion, in which he joined. *Id.* Moreover, it is not even clear that the plurality opinion in *Lehnert* should be read as proposing a ban on "extra-unit" charges for lobbying that is

In sum, as the United States correctly concludes, *see* U.S. Br. 20-21, there is no principled basis for excluding litigation expenses from *Lehnert*'s unanimous rule that otherwise chargeable expenses of a parent union may be charged on a pro rata basis to members in all affiliated units.[19]

"otherwise chargeable" (*i.e.*, lobbying in support of ratification or implementation of a collective bargaining agreement); and the opinion certainly does not state any basis for such a limitation. The discussion of lobbying in Part III.A. of the plurality opinion *precedes* the discussion in Part III.B. of "[p]etitioners' contention that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit." *Id.* at 522 (plurality opinion). In the discussion of lobbying, the plurality opinion sometimes refers to "ratification or implementation of a dissenter's collective-bargaining agreement," *id.* at 520; *see also id.* at 521 (referring to "objecting employees['] . . . collective-bargaining agreement"); but the plurality sometimes refers more broadly to lobbying for "the effectuation of *a* collective-bargaining agreement," *id.* (emphasis added), and to lobbying in the context of "contract ratification or implementation," *id.* at 522. Most to the point, in describing the kinds of lobbying that should not be chargeable, Justice Blackmun refers to lobbying for "financial support of the employee's profession or of public employees generally," *id.* at 520, and to lobbying concerning topics other than "the terms and conditions of employment," *id.* at 521. At no point does Justice Blackmun's opinion state directly that parent union expenditures for *otherwise chargeable* lobbying—that is to say, lobbying for "the effectuation of a collective-bargaining agreement," *id.*—should be chargeable only on a unit-by-unit basis. In any event, if the plurality's discussion of lobbying is read as petitioners would read it, that discussion, like the plurality's discussion of litigation, failed to command a majority.

[19] That is the view of each of the four courts of appeals that have considered this question in the past several years. In addition to the decision below, *see Otto, supra; IAM v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998); *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995). The National Labor Relations Board has reached the same conclusion, in the decision that was

II. PETITIONERS' SUGGESTIONS THAT *LEHNERT* SHOULD BE OVERRULED ARE NOT PROPERLY PRESENTED

As the United States points out, petitioners' Question Presented "affirmatively relies on *Lehnert*," U.S. Br. 18, and "the body of the petition for a writ of certiorari likewise relied heavily on *Lehnert*, without suggesting that it be overruled," *id.*

Nevertheless, in their brief, petitioners argue that *Lehnert* should be overruled—although it is not clear what part of *Lehnert* petitioners would jettison. At some points petitioners seem to confine their attack to *Lehnert*'s holding as to parent union "extra-unit" expenditures made from pooled resources. *See* Pet. Br. 43, 50; *see also* U.S. Br. 18 (reading petitioners' brief as suggesting "that this Court should overrule *Lehnert* and hold that units may not use compelled fees for *any* pooling arrangements") (emphasis in original). But at other points, petitioners appear to attack *Lehnert*'s three-pronged test for determining the chargeability of union expenditures generally. *See* Pet. Br. 36-37.

The United States correctly states that petitioners' attack on *Lehnert*, however it might be understood,

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enforced by the Seventh Circuit in the *IAM* case. *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995). Petitioners cite cases from two state courts and the Tenth Circuit that have dealt with this issue. Pet. Br. 27 n.14. As petitioners' own characterizations of those cases indicates, none of them contains any analysis as to why the logic of *Lehnert*'s holding does not apply to litigation expenses; the cases cited by petitioners—which were decided in 1991 and 1992, and have not been followed by any other court in the ensuing sixteen years—merely declare, erroneously, that a majority of the Court in *Lehnert* adopted the position stated in Justice Blackmun's plurality opinion.

"falls outside of the far narrower question presented [by the petition for certiorari], which affirmatively *relies* on *Lehnert*." U.S. Br. 18 (emphasis in original). By framing their petition in that manner, petitioners "excluded [the] argument" they now seek to raise. *Id.*, citing *Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992). That argument is not "fairly included [with]in" the question presented in the petition, S. Ct. Rule 14.1(a), and it is this Court's practice not to consider such a question except in the "most exceptional cases." *Yee*, 503 U.S. at 535 (quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976)).

This is not such a case. As we have seen, the *Lehnert* Court was unanimous on the proposition that otherwise chargeable parent union expenditures from pooled resources may be charged on a pro rata basis to objecting feepayers in all of the parent union's affiliated local unions. *See supra* at 18; U.S. Br. 18. There is no reason why the Court should revisit that unanimous holding.[20]

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[20] Petitioners make an argument that chargeability determinations are "subject to a 'strict scrutiny' analysis," Pet. Br. 28, but they do not explain where that principle should lead, except to suggest that *Abood*, *Ellis* and *Hudson* are consistent with their conception of strict scrutiny while *Lehnert* is not. *See* Pet. Br. 29-31 (discussing *Abood*); *id.* at 29, 32 (discussing *Ellis*); *id.* at 30 n.16 (citing *Hudson*). But as we have shown, this Court's decision in *Lehnert*, and the decision of the First Circuit in this case, are fully consistent with those earlier decisions. And, we agree with the United States that "[e]ven assuming *arguendo* that a least-restrictive-means test applies," U.S. Br. 19, it is satisfied here because "prohibiting unions from using compelled fees for pooling arrangements would require them to choose between foregoing [sic] an efficient means of spreading risk, on the one hand, or permitting free riders, on the other," *id.*, thereby undermining the compelling interests recognized in *Abood*.

To be sure, in *Lehnert* four Justices disagreed with the three-pronged test adopted by the Court for determining the chargeability of union activities generally, whether undertaken within or outside the affected bargaining unit, and those Justices proposed a "statutory duties" test which they maintained would be "more administrable." *See* 500 U.S. at 550-58 (Scalia, J., concurring in the judgment in part and dissenting in part). But the Justices who favored the "statutory duties" test made clear that under that test of chargeability, just as under the three-pronged test, parent union expenditures from pooled resources that are *otherwise chargeable* would be chargeable to all objecting feepayers. *See supra* at 18. What is more, the chargeability standard that both MSEA and SEIU applied, *see* Pet. Br. 5 (quoting JA 89), is very similar to the standard petitioners appear to be proposing, *see* Pet. Br. 50-51.

Thus this case is not a proper vehicle for revisiting the debate on whether a "statutory duties" test would be superior to *Lehnert*'s three-pronged test. And petitioners are wrong in any event in the basis they give for revisiting that debate—their contention that the *Lehnert* test has "confused" the lower courts. *See* Pet. Br. 36-37. In reality, the only confusion has been over the specific question presented here, as to whether litigation expenditures should be categorically excluded from *Lehnert*'s holding as to "extra-unit" expenditures generally. *See* cases cited in Pet. Br. 37-38.[21] It is true that this Court has recognized

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[21] In particular, Judge Silberman's complaint that *Lehnert* fails to provide "a principled basis for distinguishing expenditures that are 'germane' from those that are not," *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring *dubitante*), was based principally on what Judge

that it sometimes may be "difficult to define germane speech with ease or precision where a union or bar association is the party," *Board of Regents v.*

Silberman perceived as the incongruity of a rule (which he mistakenly read *Lehnert* to have adopted) that "litigation expenses incurred by the union in another unit on a matter that relates to collective bargaining—perhaps even an interpretation of a collective bargaining agreement identical to that of the objecting employees' unit—are not thought 'germane'," *id.*

It bears noting that the *amicus* brief complaining of a supposed lack of clarity in the *Lehnert* three-pronged chargeability test was submitted by the Commonwealth of Virginia, which has no experience whatsoever with administering service-fee systems because public sector agency shop agreements are prohibited by law in Virginia. *See* Va. Code Ann. §§ 40.1-58.1, 40.1-62. No governmental entity that is party to a collective bargaining agreement providing for service fees has submitted a brief arguing that the *Lehnert* test should be replaced.

Furthermore, Virginia's assertion that "the . . . *Lehnert* test . . . has been pilloried in academic publications," Brief for the Commonwealth of Virginia as Amicus Curiae at 19, is unfounded. The essay by Professor Farber that is cited by Virginia merely cites *Lehnert* in passing in a footnote to a text discussion in which Professor Farber rejects out of hand this Court's entire "public forum" jurisprudence. Daniel L. Farber, *Essay: Missing the "Play of Intelligence,"* 36 Wm. & Mary L. Rev. 147, 155 and n.14 (1994). (And that essay does not pillory *Lehnert* so much as it pillories this Court's entire "current work product." *Id.* at 147, 148.) The other article cited by Virginia urges a position that petitioners certainly would not embrace, namely that "[t]he compelled subsidization of the speech of others violates the First Amendment only when the funds collected are used to promote the message of an identifiable viewpoint or interest in debate in a controversial political issue." Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. Davis L. Rev. 1087, 1130 (2005). Under that approach, the *Lehnert* three-pronged chargeability test would be much too *narrow*, because, "so long as funded speech is neither political nor ideological, there is no First Amendment violation." *Id.* at 1131.

Southworth, 529 U.S. 217, 232 (2000), and that there can be "difficult problems in drawing lines" between chargeable and nonchargeable expenditures, *Abood*, 431 U.S. at 236; *see also Keller*, 496 U.S. at 15. But these statements simply acknowledge the difficulties that are inherent in the subject matter; they do not suggest or that there would be no such "difficult[ies]" and no such "problems in drawing lines" under a "statutory duties" test—much less that the Court has erred in regarding "germane[ness] to collective bargaining" as the touchstone of chargeability, as it has for more than fifty years, *see, e.g., Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 235 (1956); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 121 (1963).

III. THERE IS NO BASIS FOR A REMAND TO DETERMINE WHETHER THE UNION HERE OPERATED UNDER THE GOVERNMENT'S PROPOSED "BONA FIDE POOLING ARRANGEMENT" STRUCTURE

The United States correctly states that the portion of a local union's affiliation fee that may properly be charged to a local union's objecting feepayers is only the portion that goes to financing a parent union's otherwise chargeable activities; and the Government acknowledges that "the court of appeals recognized" this legal requirement. U.S. Br. 25. So did MSEA. *See supra* at 5. The Government further recognizes that the court of appeals "correctly rejected" the only arguments petitioners have advanced in this case. U.S. Br. 29 n.4. But the Government suggests that petitioners should have asserted a position they never have asserted, namely, that *Lehnert*'s holding approving the chargeability to objectors in all affiliated local unions of a parent union's "otherwise chargeable"

extra-unit expenditures from pooled resources should be limited to cases where there has been a showing that a parent union and its local union affiliates are parties to a "bona fide pooling arrangement" under which "each participating unit. . . ha[s] some reasonable assurance that, when needed, the pool will pay for its germane litigation" and that, "[i]f the national or international union assists with some but not all germane litigation, it . . . ha[s] reasonably ascertainable standards for determining which litigation is included in the pooling arrangement." U.S. Br. 25. *See also id.* at 27-28.

A.

The United States' argument is not properly before the Court. In the courts below, in the petition for certiorari, and in petitioners' brief on the merits, petitioners have never raised this argument or anything remotely resembling it. Petitioners have never disputed that, as to activities other than litigation, the "extra-unit" expenditures that SEIU and MSEA have treated as chargeable would be chargeable under *Lehnert*; petitioners have argued only that *Lehnert*'s "standards by which *other* extra-unit activities could be measured," Pet. Br. 10 (emphasis in original), should not apply to extra-unit litigation. The suggestion now advanced by the Government that, to determine whether *any* of SEIU's expenses on "extra-unit" activities are chargeable, it is necessary to determine whether SEIU and MSEA have a "bona fide pooling arrangement" as the Government defines that term, comes only from an *amicus*, and should not be entertained by this Court. *See, e.g., Kamen v. Kemper Fin.*

Servs., Inc., 500 U.S. 90, 96 n.4 (1991); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).[22]

B.

1. Beyond that, we would be derelict if we did not add that the United States' contention that *Lehnert* rests on a "bona fide pooling arrangement" requirement could hardly be more wrong. Far from requiring examination of the manner and means by which a parent union decides when and to what extent it will devote pooled affiliation fee resources to providing particular services to a particular local union, the *Lehnert* Court based its decision on its understanding of "the unified-membership structure under which so many unions . . . operate," *id.* at 523, and the "essence of" the typical union "affiliation relationship," *id.* *Lehnert* upheld parent union affiliation fee resource-pooling by all unions that "operate" under a "unified-membership structure" that embodies the "notion" that the parent union "will bring to bear its often considerable . . . resources when [an affiliated] local is in need of them." *Id.* *Lehnert* did *not* limit its holding

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[22] The United States argues that remand is appropriate because the legal standard it proposes "alters the playing field in some important respects." U.S. Br. 29 n.4 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). In *Adarand*, however, the remand was as to issues that had been raised by the parties, but had not been addressed by the Court of Appeals because that court had applied a legal standard inconsistent with what this Court held to be appropriate. *Adarand* does not provide any warrant for a remand as to an issue never raised by a party, especially where the court of appeals correctly understood the law, as the United States acknowledges is the case here. *See* U.S. Br. at 25, 27 (stating that "the court of appeals recognized" and properly "explained" the principles applicable to the chargeability of parent union extra-unit expenditures from pooled expenses).

in that regard to unions that operate under the Government's heretofore unheard of "bona fide pooling arrangement" structure.

The Court's "conclu[sion]" was in the following general terms: "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Id.* at 524. And, of equal moment, the *Lehnert* Court held that it was proper for the local union in that case to charge objecting nonmembers for the parent union's extra-unit expenditures "germane to collective bargaining and similar support services," *id.* at 527, on the basis that the parent union operated under a "unified-membership structure," *id.* at 523—without requiring or finding that the union operated under a "bona fide pooling arrangement" structure such as the Government here proposes—because "unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union," *id.* at 527.[23]

2. The Government's argument for its proposed "bona fide pooling arrangement" requirement, aside from its false attribution of that requirement to the *Lehnert* Court, amounts to an assertion that, if a parent union does not guarantee to cover the costs of all the chargeable litigation that an affiliated local union that pays its required affiliation fees may conduct, or

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[23] The record in *Lehnert* contained no evidence that the parent union in that case operated under anything like the Government's proposed "bona fide pooling arrangement" structure. *See* Joint Appendix in *Lehnert v. Ferris Faculty Ass'n*, O.T. 1990, No. 89-1217.

provide "ascertainable standards" for determining when and how it will assist its affiliated local unions with chargeable litigation, the parent union's use of pooled affiliation fee resources for extra-unit litigation expenses constitutes "a vehicle by which some units use compelled fees to subsidize other units' litigation." U.S. Br. 24. That is a *non sequitur*.

Each of the local unions that is party to a prototypical affiliation relationship of the kind at issue in *Lehnert* and this case knows that it potentially may receive assistance from its parent union with respect to the local union's chargeable activities that vastly exceeds in cost the amount that the local has paid in affiliation fees. All that it takes is one complex or protracted round of collective bargaining or one expensive piece of collective-bargaining-process-related litigation. That being so, the one point that is certain is that the cost pooling involved in a union affiliation relationship, whereby the parent union makes determinations based on its judgment and experience as to when and to what extent assistance will be provided to a local union affiliate, is *not* a scheme to compel "some units . . . to subsidize other units' litigation," U.S. Br. 24.

And there is an evident need for parent unions to make such determinations on the basis of judgment and experience. In any given year, the aggregate demand of affiliated local unions for assistance from the parent union in negotiating, administering and enforcing collective bargaining agreements is apt to outstrip the resources the parent union has at its disposal from the aggregate required affiliation fees its locals have paid. Thus, one of the benefits a local union receives through an affiliation relationship is the parent union's experience and judgment in determin-

ing how to allocate scarce resources to best assist local unions in their collective bargaining activities. That is a particular benefit where, as is true in this case, a local union could not afford to buy on the open market assistance of the levels the parent union potentially can provide—even if such potential assistance were in fact available for purchase on the open market. And the truth of the matter is that a parent union typically brings to bear a level of expertise with respect to providing assistance in collective bargaining that no third person could provide on the open market, and that is therefore available only to local unions that affiliate with the parent and pay the required affiliation fees.

3. The United States' proposed "bona fide pooling arrangement" requirement thus amounts to the kind of "prophylactic rule" that the Government acknowledges is *not* required by the First Amendment, under which a local union would be required to buy an insurance policy rather than be permitted to pay an affiliation fee to a parent, in order to "ensur[e] that [the] national union does not use pooling as a cover for impermissible cost shifting." *See* U.S. Br. 20. Fears that a parent union and its affiliated local unions might be tempted to engage in "impermissible cost shifting" do not justify intrusive prophylactic rules requiring parent unions to adopt the kinds of benefit schedules and claims standards that an insurance policy might provide, any more than they would justify requiring local unions to purchase an insurance policy in the first place rather than having a prototypical affiliation relationship with a parent union of the kind at issue in *Lehnert* and this case.

This Court's "repeated affirmation that courts have an obligation to interfere with a union's statutory

entitlement [to collect service fees] no more than is necessary to vindicate the right of nonmembers," *Davenport*, 127 S. Ct. at 2379 (emphasis deleted), which has guided this Court's service fee jurisprudence from the start, *see supra* at 15-16, does not countenance the "bona fide pooling arrangement" requirement the United States proposes, which would unnecessarily entangle the federal courts in matters of internal union governance and would fail "to provide unions the flexibility and discretion necessary to accommodate the needs of their constituents," *Lehnert*, 500 U.S. at 525. *See also Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65-66 (1991) (union must be afforded a "wide range of reasonableness" in representing employees) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). As the Government, in something of an irony, quite correctly observes, "[s]uch leeway is particularly appropriate for financial-management decisions concerning the best way to fund germane activities." U.S. Br. 20.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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Supreme Court of the United States

DANIEL B. LOCKE *ET AL.*, ON BEHALF OF THEMSELVES AND THE CLASS THEY SEEK TO REPRESENT,

Petitioners,

v.

EDWARD A. KARASS, STATE CONTROLLER *ET AL.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the First Circuit

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ARGUMENT

I. MSEA Proceeds from the Faulty Premise That Litigation Expenditures Are Presumptively Chargeable.

1. The underlying premise of Respondent Maine State Employees Association, Local 1989, Service Employees International Union ("MSEA"), is that litigation expenditures are presumptively chargeable to nonmembers if they "provide a tangible benefit to the local bargaining unit." Brief for Respondent MSEA ("MSEA's Brief") at 18, 23; *see also id.* at 2, 4 n.3, 13, 37 n.20. As we have already demonstrated, however, litigation expenses are presumptively nonchargeable because litigation is a core expressive First-Amendment activity conducted in a public forum and is a form of protected association. Brief for Petitioners ("Pet. Brief") at 14-19, 37 and n.20.

Although all litigation is not necessarily political, it is public in nature, involves more than just the employer and union, and is "expressive" in a First-Amendment sense, because litigation "is a means of petitioning the government that the first amendment protects." Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 857, 872 (1988).[1]

Thus, even litigation involving only economic matters —such as labor contracts—is akin to lobbying in its relationship to the First Amendment. Where "groups with common interests . . . use the channels and procedures of

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[1] "*Chicago Teachers Union v. Hudson*" is *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986).

state and federal agencies and courts to advocate their causes and points of view *respecting resolution of their business and economic interests*," their "right of access to the agencies and courts . . . is part of the right of petition protected by the First Amendment." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 513 (1972) (emphasis added).

Unlike litigation, collective bargaining is not protected by the First Amendment. *See Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979) (*per curiam*). Moreover, "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. ___, 127 S. Ct. 2372, 2379 (2007).

Thus, the default value for core First-Amendment activities in a public forum—politics, lobbying, public relations, organizing, and litigation—is that they are not chargeable. This Court has drawn only a narrow exception, holding that such activities may be treated as chargeable to dissenters only when they are "activities in which the union owes a duty of fair representation to the . . . nonunion-members of the union's own bargaining unit," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556, 558 (1991) (Scalia, J., concurring in the judgment in part, dissenting in part), or activities necessary for "the ratification or implementation of a dissenter's collective-bargaining agreement." *Id.* at 520 (Blackmun, J., plurality opinion).

Politics,[2] organizing,[3] and public relations[4] are never chargeable because they neither involve the ratification or implementation of the dissenter's bargaining agreement nor are they part of the statutorily-mandated bargaining process. Lobbying is nonchargeable, except in the "limited context" of "the ratification or implementation of a dissenter's collective bargaining agreement," because otherwise "the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 520, 522 (plurality opinion); *accord id.* at 527 (plurality opinion); *see id.* at 559 (Scalia, J., concurring in relevant part).

The same holds true for litigation. Therefore, litigation is presumptively nonchargeable. Only when it involves negotiation, ratification or implementation of the dissenter's collective bargaining agreement can nonmembers be compelled to subsidize it.

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[2]Political activities are not chargeable because "[n]one of these activities [is] shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement." *Lehnert*, 500 U.S. at 527; *see id.* at 559 (Scalia, J., concurring in relevant part).

[3]Organizing is not chargeable because, "[b]y definition, . . . organizing expenses are spent on employees outside the collective-bargaining unit already represented." *Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984); *see also id.* at 452 n.13 (organizing within the unit is also nonchargeable, but for a different reason).

[4]Public relations is not constitutionally chargeable because it occurs "in a public forum," *i.e.*, outside the bargaining unit, and "extends beyond the negotiation and grievance-resolution contexts." *Lehnert*, 500 U.S. at 528-29; *see id.* at 559 ("[p]ublic relations activities" are nonchargeable because they "are no part of th[e] collective-bargaining process") (Scalia, J., concurring in relevant part).

It was only when this Court considered direct "collective bargaining and similar support services," *id.* at 527 (plurality opinion), that it departed from the bright line of the bargaining unit in determining whether compelled subsidization "significantly add[ed] to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519 (plurality opinion). But that departure has led to confusion concerning the nonchargeability of extra-unit litigation expenditures both by the courts below and by MSEA.

2. As we have shown, core expressive First-Amendment activity, including the compelled support of litigation, is subject to strict scrutiny. Pet. Brief at 28-36. Only by ignoring strict scrutiny did MSEA argue that its affiliate's pooled litigation expenses, across all bargaining units, are chargeable to the Nonmembers.

In contrast to MSEA, Justice Scalia, in applying his "statutory duties" test to the specific activities challenged in *Lehnert*, applied "strict scrutiny." For instance, he found public relations nonchargeable because "[t]here is . . . certainly *no compelling reason sufficient to survive First Amendment scrutiny* . . . for the state to interfere in the private ordering of these arrangements, for the state itself has not distorted them by compelling the union to perform." 500 U.S. at 557 (emphasis added). Only "where the state creates in the nonmembers a legal entitlement from the union . . . may [it] compel them to pay the cost." *Id.* at 556. The "'compelling state interest' that justifies this constitutional rule is not simply elimination of . . . 'free-riding' nonmembers; [but only] . . . the 'free riders' who are nonunion members of the union's own bargaining unit . . . whom the law *requires* the union to carry." *Id.*

3. The Nonmembers' First-Amendment interests also receive short shrift in MSEA's Brief. To the extent that MSEA mentions the First Amendment at all, it claims a First-Amendment *entitlement* to extract monies from unwilling individuals, rather than recognizing the First-Amendment limit upon its authority.[5] In comparison, the Brief for the United States as *Amicus Curiae* ("Solicitor's Brief") is cognizant that the question before the Court involves a First-Amendment prohibition,[6] for the language of the Amendment itself is decidedly prohibitive (*i.e.*, "Congress shall make no law . . . .," U.S. Const. amend I), not permissive.

This Court explicitly rejected theories of union "entitlement" to compelled fees in *Davenport*, where a union equated its pecuniary interest in compelled fees to nonmembers' First-Amendment rights "impinge[d]" by those fees.[7] In *Davenport*, a union challenged a state statute limiting its authority to collect compelled fees for political purposes, arguing that the statute constituted "a [First-Amendment] limitation on how the union may spend 'its' money." 127 S. Ct. at 2380. *Davenport* categorically

---

[5]*See* MSEA's Brief at 2 ("the First Amendment permit[s] charging such a service fee to nonmembers"), 13 ("the First Amendment permits").

[6]*See* Solicitor's Brief at 1 ("This case concerns the extent to which the First Amendment prohibits . . . ."); 6 ("the First Amendment limits the types of other expenses that nonmembers may be required to pay"); 8 ("Agency-shop and union-shop arrangements directly impact the First Amendment interests of workers who are compelled by state law to pay fees to a union they do not wish to join.").

[7]"[T]he agency shop itself is 'a significant impingement on First Amendment rights.'" *Hudson*, 475 U.S. at 307 n.20, *citing Ellis*, 466 U.S. at 455.

rejected this proposition, holding that the statute "is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people*'s money." *Id.* (original emphasis).

This conclusion was not surprising because the Court recognized that "in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977), we held that public-sector unions are constitutionally *prohibited* from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective-bargaining duties." *Davenport*, 127 S. Ct. at 2377 (emphasis added).[8]

II. MSEA Re-Writes *Ellis* Because *Lehnert* Affirmed *Ellis*' Categorical Bar.

1. MSEA asserts that *Ellis*, 466 U.S. at 453, did not hold "pooled litigation expenditures to be nonchargeable." MSEA's Brief at 21. MSEA denies that *Ellis* addressed a "pooling arrangement," *i.e.*, the aggregation of nonmembers' forced fees in a national affiliate's general treasury from which litigation could be funded in any bargaining unit, including the dissenting nonmembers'. MSEA's Brief at 22 & n.10. But as we already have demonstrated from the *Ellis* record, Pet. Brief at 13, 21-22, MSEA is wrong

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[8]As Justice Souter—joined by the Chief Justice and Justices Scalia and Thomas—observed in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), "two . . . basic principles of First Amendment law" are "that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the [First-] Amendment's scope, and that protected speech may not be made the subject of coercion to speak or coercion to subsidize speech." *Id.* at 478 (Souter, J., dissenting).

that *Ellis* involved only direct contributions of a local's monies to litigation in other units without expectation of later reciprocal contributions.

MSEA's assertion is less about *Ellis*' facts than about the failure of this Court to use there the "magic words" of "pooled litigation expenditures." But creative re-phrasing should not trump this Court's categorical and unanimous holding in *Ellis*—on the identical factual structure—that extra-unit litigation is nonchargeable. 466 U.S. at 453. Thus, *Ellis* set down a general standard, focusing on the relationship of the litigation expense to "the unit" as the sole basis for treating it as chargeable, not on whether the expenses were "pooled" or not. *See* Pet. Brief at 11-12.[9]

The *Ellis* Court considered *and rejected* the argument that pooling was a permissible method of evading the categorical bar to compelling nonmembers to subsidize extra-unit litigation. 466 U.S. at 453. This is evident from the union's brief in *Ellis*:

> The negotiation of collective bargaining agreements is cyclical. Some staff—for example, economists, actuaries, *and lawyers* specializing in negotiations—may not be required at all except during peaks in the bargaining cycle. However, hiring and retraining costs may make it impossible to adjust the size of the staff in response to cyclical variations. Consequently, a union which cannot shift such specialized resources from one

[9]Contrary to MSEA's intimations, MSEA's Brief at 32-35, we do not even vaguely suggest that the Nonmembers cannot be compelled to subsidize the local's or its affiliates' litigation activities for collective bargaining within and for their own bargaining unit.

> collective bargaining crisis to another may be forced to choose between limiting these services and maintaining what economists call "excess" capacity. Thus, organizing . . . permits a union to spread both fixed costs and excess capacity over more members, *decreasing* the average cost per member in the original unit and/or *increasing* the support services available to benefit each member in the bargaining process.

Brief for Respondents, *Ellis v. Railway Clerks*, O.T. No. 82-1150, at 39-40 n.24 (first emphasis added).

The *Ellis* union's brief even more explicitly made the pooling argument on its next pages:

> A running theme of petitioners' brief is that they may be required to support only "the statutorily required collective bargaining activities *with Western Airlines*." Pet. Br. 15.
>
> . . . [P]etitioners' statutory argument cannot be reconciled with Congress' special concern for the financial needs of . . . national unions.
>
> These complex institutions' costs must be met yearly whether or not in that year negotiations of a new contract are conducted with any given employer, yet all represented employees benefit by having that institutional structure in place when negotiations with *their* employer do occur. So too, one of the major purposes of workers joining in national unions is to *pool* the collective strength of as many as possible to achieve their bargaining goals. The employees of Western Airlines (for example) are strengthened in their negotiations

> with that employer by the availability of strike support funds collected from *all* the members of the union, not just those employed by Western.

Id. at 40-41 (third emphasis added; record citations omitted). Obviously, these pooling and economies of scale arguments apply to litigation. Nevertheless, this Court rejected them in that context. *Ellis*, 466 U.S. at 453.

2. Likewise, MSEA's assertion that extra-unit litigation expenditures were "made chargeable by *Lehnert*," MSEA's Brief at 31, is meritless. *Lehnert* followed and applied *Ellis*' bright-line test on extra-unit litigation expenditures, and does not purport to do otherwise. *See* Pet. Brief at 21-26.

Similarly meritless is MSEA's assertion that extra-unit litigation expenses are no different from other "parent union expenditures." MSEA's Brief at 31-35. MSEA finds support in the observation that "[t]his Court has refused to 'elevate the Petition Clause to special First Amendment status,' *McDonald v. Smith*, 472 U.S. 479, 485 (1985), because 'there is no sound basis for granting greater constitutional protection to statements made in a petition to the [government] than other First Amendment expressions,' *id.*" MSEA's Brief at 31-32.

But the Nonmembers do not argue that because litigation involves the petitioning of government it has a "special First Amendment status." The Nonmembers' point is that litigation is a core First-Amendment activity in a public forum on a par with other expressive activity protected by the First Amendment. *McDonald* makes that same point: "The right to petition is cut from the same

cloth as the other guarantees of that Amendment . . . ." 472 U.S. at 482.

MSEA's argument is really that because the Petition Clause does not have a "special First Amendment status," it has *no* First Amendment status. This is clearly wrong. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (right of petition is protected by the Bill of Rights and cannot be infringed by application of the Sherman Anti-Trust Act to quash efforts seeking government action for anti-competitive purposes); *Bill Johnson's Rest., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (even in a labor law context, employees' right to unionize cannot trump an employer's First-Amendment right of access to the courts).

McDonald thus does not support MSEA's claim that nonmembers can be forced to subsidize far-flung litigation having no connection to their bargaining unit.

A. To Conclude That *Lehnert* Permitted Charges for Extra-Unit Litigation, the Court Must Conclude That *Lehnert* Altered *Ellis*' Categorical Rule *Sub Silentio*.

MSEA cites Justice Kennedy's *Lehnert* dissent as authority for its conclusion that *Ellis*' categorical holding on facts as those here permits MSEA to force the Non-members to subsidize its affiliate's extra-unit litigation. MSEA treats Justice Kennedy's opinion as the opinion of the Court on this issue, MSEA's Brief at 18, 21-23, even though no other Justice joined Justice Kennedy's opinion. *Lehnert*, 500 U.S. at 562 (Kennedy, J., concurring in the judgment in part, dissenting in part).

In addition, MSEA overreads Justice Kennedy's opinion, which relied on what was *not* said in the *Ellis* opinion, and makes no reference to the underlying facts and briefs in that case.

Furthermore, Justice Kennedy's opinion is not necessarily the blanket endorsement of charging for extra-unit litigation under informal "pooling arrangements" that MSEA suggests. After all, Justice Kennedy explicitly "join[ed] all except for Part III-C of Justice SCALIA's opinion."[10] 500 U.S. at 562 (Kennedy, J.). As demonstrated in the Petitioners' Brief at 26-27, Justice Scalia pointedly *excluded* litigation from his list of affiliates' "chargeable, on-call services for use in the bargaining process," which includes only "negotiating advice, economic analysis, and informational assistance." 500 U.S. at 561 (Scalia, J.).

That Justice Kennedy alone commented separately on extra-unit litigation expenditures, when otherwise joining Justice Scalia's opinion, *id.* at 550, strongly implies that Justice Scalia and the two other Justices for whom he wrote agreed with Justice Blackmun's conclusion that extra-unit litigation is not chargeable to dissenters, even if it is assumed that Justice Kennedy did not. That implication is strengthened by the fact that Justice Scalia quoted *Ellis*' holding on extra-unit litigation and immediately thereafter said "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." 500 U.S. at 555.

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[10]Part III-C speaks only to the issue of expenditures in preparation for an illegal strike. 500 U.S. at 562 (Scalia, J.).

Moreover, to accept MSEA's reading of Justice Kennedy's opinion in *Lehnert*, this Court would have to conclude that the opinions of Justices Marshall and Kennedy on extra-unit litigation expenditures actually constituted the majority opinion on that issue, but that no one—*including Justices Marshall and Kennedy*—realized it. Indeed, the Court would have to conclude that Justice Marshall was entirely mistaken when he said, "I . . . disagree with *the Court's decision* that the costs of articles printed in [the state affiliate union's] employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (dissenting in pertinent part) (emphasis added).[11]

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[11]Justice Kennedy "would draw the same substantive line for litigation and lobbying." 500 U.S. at 563. So too would we. But, as we demonstrate, *supra* at 1-3, litigation and lobbying are both core First-Amendment activities in public fora that are constitutionally non-chargeable, no matter how funded, unless they are "oriented toward the ratification or implementation of [the objecting nonmembers'] collective-bargaining agreement," *id.* at 527 (opinion of Blackmun, J.); *see id* at 559 (opinion of Scalia, J.) ("the challenged lobbying expenses are nonchargeable" because they "are no part of th[e] collective-bargaining process"). The lobbying expenses challenged in *Lehnert*, "the costs of a . . . program designed to secure funds for public education in Michigan," obviously were related to funding teachers' salaries under public school districts' collective bargaining agreements. *See id.* at 535 (Marshall, J., dissenting in pertinent part). Nonetheless, the Court held them nonchargeable because "[n]one of these activities was shown to be oriented toward the ratification or implementation of *petitioners'* collective bargaining agreement." *Id.* at 527 (Blackmun, J.) (emphasis added); *see id.* at 559 (opinion of Scalia, J., concurring in pertinent part).

B. Union Convenience Does Not Trump Nonmembers' Constitutional Rights.

1. MSEA and *amicus* Solicitor General offer several prudential arguments for the pooling of litigation expenditures. They hope that this Court will determine that union convenience in funding its far-flung extra-unit litigation trumps Nonmembers' First-Amendment right to refrain from compelled support. The Court has already rejected similar justifications.

In *Davenport*, this Court said that its compelled-fees jurisprudence did "not balanc[e] constitutional rights in the manner [the union] suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." 127 S. Ct. at 2379. Here, as in *Davenport*, MSEA claims the need to balance its financial convenience against the Nonmembers' rights, merely because MSEA speculates that "'costs might spike in certain years'" under a contrary rule. MSEA's Brief at 19 (*quoting* Solicitor's Brief at 15-16). MSEA asserts that, absent "pooling," "each employee in the local bargaining unit that received the assistance would have to pay a very large amount in a single year, far in excess of the employee's normal local union dues or service fee." MSEA's Brief at 19.

But the concern that in some years a *pro rata* share of chargeable services provided to a bargaining unit might exceed dues is entirely speculative. Moreover, while that concern might be a ground for a union dues increase in some years, it is no reason to invade the First-Amendment rights of the Nonmembers by forcing them to pay for services *not* provided to their unit year after year. Certainly, this Court did not see it as such when it adopted a

bargaining-unit test for litigation expenditures in *Ellis*, 466 U.S. at 453. In any event, union economies of scale or efficiencies cannot be balanced against Nonmembers' constitutional rights. *Davenport*, 127 S. Ct. at 2379; *cf. Ellis*, 466 U.S. at 451-52 (rejecting argument that organizing expenditures should be chargeable because they "strengthen the bargaining power of unions").[12]

2. The Solicitor General offers a variation on this theme, asserting that nonmembers benefit from pooling arrangements because they are not subject to the speculative "financial risks [a unit-by-unit funding mechanism may impose] on members and nonmembers alike." Solicitor's Brief at 15-16 ("That approach could cause fees to fluctuate wildly from year to year, however, because a unit might have low litigation costs in most years, but litigation costs might spike in certain years, such as when a strike occurs."). However, this too is pure speculation, as expenses in many bargaining units may never "spike" at all, thereby leaving nonmembers to subsidize extra-unit litigation for years on end without ever obtaining even the most attenuated "benefits."

The Solicitor General observes that the "Constitution no more requires one particular method of accounting than

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[12]The lower courts have agreed. *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 (2D CIR. 1987) ("balancing . . . the cost to the union and the practicality of the procedures . . . against the dissenters' First Amendment interests" impermissible); *see also Prescott v. County of El Dorado*, 177 F.3d 1102, 1108 (9TH CIR. 1999) ("'excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson*'s requirement that the procedures used . . . to allocate . . . be carefully tailored to minimize the intrusion on the nonmembers' rights'"), *vacated and remanded*, 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 984 (9TH CIR. 2000), *quoting Andrews*, 829 F.2d at 339.

it enacts Herbert Spencer's social statics." Solicitor's Brief at 26 (paraphrasing *Lochner v. New York*, 198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting)). However, the Constitution likewise does not enshrine as a "compelling *state* interest" sufficient to impinge upon nonmembers' First-Amendment rights a union's notions of economies of scale and/or judgments as to allocation of financial risk. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, — U.S. —, 127 S. Ct. 2738, 2779 n.15 (2007) (Thomas, J., concurring) (observing that "democratic" interest does not qualify as a "compelling [state] interest" under the Constitution or Court precedent).

Thus, the First Amendment *precludes* the use of accounting evasions to frustrate this Court's categorical holding prohibiting forced subsidization of extra-unit litigation activities.[13] *Ellis*, 466 U.S. at 453; *see also* Pet. Brief at 43-49 (limitations imposed by *statute* by the Maine legislature). Due regard for legislative determinations limiting a union's authority and obligations to the *bargaining unit* of necessity also limits compelled fees to the Nonmembers' bargaining unit, at least where core First-Amendment activity in a public forum is involved. *See* Pet. Br. at 43-50.

The Nonmembers do not ask this Court to substitute its economic judgments for those of the Maine legislature. To the contrary, those judgments are reflected most clearly in the statute authorizing collective bargaining for

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[13] *See Abood*, 431 U.S. at 237 n.35; *cf. Glickman*, 521 U.S. at 505 n.3 (Thomas, J., dissenting) (observing that "part of the Constitution—the First Amendment—does enact a distinctly individualistic notion of 'the freedom of speech,' and Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere").

State employees. That statute defines the authority and obligations of the collective bargaining representative, and limits them to the union's representation of the specific unit. *Id.* And the State's interests are distinct from those of MSEA, which surely seeks to expand its authority at every opportunity.[14]

C. Union "Pooling" Arrangements Are Not Tantamount to Insurance, Nor Do They Provide Any Expectancy That Services Will Actually Be Provided.

MSEA's suggestion that its "pooling arrangement" is tantamount to insurance, MSEA's Brief at 10, 19-20, *see also* Solicitor's Brief at 6, 15-18, is factually unsound. The *amicus* Brief for the Pacific Legal Foundation *et al.* ("PLF Brief"), rightly notes that, "[i]n the context of a First Amendment challenge to the use of compelled fees, the insurance analogy breaks down," because insurance rate-setting is distinct from a union's affiliation fees. *See* PLF Brief at 14-15 (explaining distinctions).

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[14]In *Abood*, Justice Powell, concurring, warned against confusing "the interest of partisan organizations with governmental interests." 431 U.S. at 259-60, *quoting Elrod v. Burns*, 427 U.S. 347, 362 (1976). That warning resonates here, where the State Respondents neither filed a brief, nor joined in MSEA's Brief, to explain the State's "paramount" or "vital" interests in compelling the Nonmembers to subsidize SEIU's litigation in other units and/or States. So far as we are able to discern, there is no precedent for a government eschewing before this Court defense of its allegedly "paramount" or "vital interest[s]." *Cf. Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights").

Union affiliation is not even vaguely analogous to an insurance policy guaranteeing specified services on demand for a flat rate, as MSEA and the Solicitor suggest. Insurance is a contract in which one party, for consideration, agrees to pay money or provide specified services to another on a specified contingency. *See* 43 Am. Jur. 2d Insurance § 1 (1982).

MSEA grudgingly admits in a footnote that its "pooling arrangement" with SEIU is not "insurance," or anything close to "insurance." "[I]n an affiliation relationship, a local union does not have a guarantee that, in any particular year, it will receive assistance from the parent union at a level of cost equal to the local's affiliation fee payments." MSEA's Brief at 20-21 n.9. MSEA also admits that the SEIU has unfettered discretion to fund (or not) MSEA's litigation: "the parent union makes determinations based on *its judgment* and experience as to *when* and to *what extent* assistance will be provided to a local union affiliate").[15] *Id.* at 44 (emphasis added).

Thus, MSEA itself concedes that there is *no* enforceable or realistic expectation that *any* particular local union litigation will be funded, and that any resemblance between "affiliation" and "insurance" is purely illusory.[16]

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[15]There is no factual record in this case on the actual process by which MSEA's parent union makes its determinations. Nevertheless, this Court may certainly accept as true MSEA's own descriptions of the unfettered discretion possessed by SEIU in this relationship. MSEA's Brief at 20-21 n.9, 44.

[16]A concrete example of the illusory nature of the "affiliation relationship" are the comments of the Change to Win ("CTW") coalition—of which SEIU is a member. SEIU Frequently Asked Questions, http://www.seiu.org/faqs/faq_changetowin.cfm (last visited (continued...)

Moreover, insurance premiums do not include costs of services that the payor can never use or that are received by individuals who pay no fee. SEIU affiliation fees include the costs of services that can never be provided to MSEA, because other locals represent different types of employees and/or operate under different bargaining statutes, including those under the NLRA and employees in Canada (Service Employees International Union, CTW, CLC, Frequently Asked Questions, http://www.seiu.org/faqs/faq_whatisseiu.cfm (last visited Sept. 2, 2008)). They also include the costs of services for employees who pay no fee, because SEIU represents private-sector employees in States that prohibit forced-unionism agreements, such as Virginia (http://www.seiu.org/lookup/results.cfm?state=va (last visited Sept. 2, 2008).

The facts here, as opposed to pure speculation, expose the fallacy of the "insurance" argument. One searches the Record in vain for some evidentiary basis demonstrating

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[16](...continued)
Aug. 27, 2008)—in response to a Department of Labor proposal to require some small local unions to file detailed LM-2 reports instead of simplified LM-3 forms. *See* Patrick J. Szymanski, Comments of Change To Win In Response to Department of Labor Notice of Proposed Rulemaking, "Labor Organization Annual Financial Reports" RIN1215-AB62, p. 12, http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006 480681b91).

Pages 10-12 of these comments argue that small and unsophisticated locals should not be burdened with such extensive filing requirements. Nowhere is it suggested that, if the requirements for small locals are implemented, SEIU (or the other five large parent unions comprising CTW) stand ready to "bring to bear [their] often considerable . . . resources to aid . . . local[s] . . . in need of them." *Lehnert*, 500 U.S. at 523. To the contrary, implicit in CTW's argument is that small unions are on their own if their reporting obligations are expanded.

how MSEA "funds its *own* litigation," whether it is "through an insurance or other risk-sharing arrangement," Solicitor's Brief at 6, or "a cost-sharing arrangement under the auspices of the affiliate [SEIU]," MSEA's Brief at 10. Certainly, no such explanations appear in MSEA's *Hudson* notice to the Nonmembers. JA 48-104. Instead, the Record only contains MSEA's admission "that the fair share fees sought [from] nonmembers in the bargaining units identified in Paragraph 11 of the Complaint are, for the period beginning after July 1, 2005, based on a calculation that treats as chargeable expenditures certain litigation in which the events that are the subject of the litigation did not involve the bargaining units." Record 31, ¶ 33 (MSEA's Answer to Plaintiffs' Verified Class Action Complaint).

MSEA did not even attempt to demonstrate that SEIU ever delivered bargaining-related services, much less litigation services, to the MSEA units—or any other units—that cost more than the dues and fees received from them.[17]

Possible economies of scale supply no compelling reason to charge dissenters more than their share of the actual costs of chargeable services provided to their own

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[17]However, the Record does contain evidence that puts into doubt the claim that MSEA "cannot provide, or afford to provide, for [bargaining-related] services on [its] own," MSEA's Brief at 16. MSEA is the "bargaining representative for approximately 10,000 [Maine state] employees," *id.* at 1 (citing JA 105-06), and MSEA determined that its 2004 "chargeable expenditures were $2,056,103," *id.* at 5 (citing JA 64), or $205.61 per represented employee. Yet MSEA charged full-time nonmembers $8.94 biweekly, or $232.44 annually, and members $18.20 biweekly, or $473.20 annually. MSEA's Brief at 4 n.4. In short, MSEA charged all unit employees more than enough to cover its bargaining-related expenses without any help from SEIU.

unit. Mergers and integration do not change the principles of cost accounting. Corporations still charge different prices, based on actual costs, to customers who receive different types or quantities of services and products; they do not charge customers for services and products not received. Conglomeration merely increases the number of customers, services, and products among which a corporation or union can legitimately allocate its general administrative costs, and the number of customers among whom it can allocate other costs common to a particular service or product provided to those customers.

The employees in the Nonmembers' bargaining unit have no legal claim to *any* services from SEIU. Their only enforceable claim—and the only one that justifies a fee—is to fair representation in collective bargaining, contract administration, and grievance adjustment in their unit. That statutory right is enforceable only against their representative, MSEA; a representative's affiliates owe no duty of fair representation. *See Teamsters Local 30 v. Helms Express*, 591 F.2d 211, 217 (3D CIR. 1979); *Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943, 947-48 (5TH CIR. 1978).

The false analogy between union affiliation ("pooling") and insurance thus fails most spectacularly when considered through the prism of "strict scrutiny." MSEA uses "pooling" to justify charging the Nonmembers for activities that it cannot charge to them directly. It also uses "pooling" to charge the Nonmembers for services that can never be charged even to employees in other bargaining units, such as in Right to Work states. "Strict scrutiny" of the First-Amendment infringement here mandates that

MSEA cannot accomplish indirectly what it clearly cannot do, under *Ellis*, directly.

III. The Nonmembers Properly Request Clarification of *Lehnert*'s General Rule in Light of the Confusion It Has Engendered.

MSEA and the Solicitor General object to the Nonmembers' call for the Court to revise and clarify *Lehnert*'s holding that permits unions to charge for any "otherwise chargeable" extra-unit expenditures, *i.e.*, affiliate expenditures "for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524. *Compare* Pet. Brief at 39-53, *with* MSEA's Brief at 36-40 *and* Solicitor's Brief at 18-20.[18]

MSEA expresses the inability to discern "what part of *Lehnert* petitioners would jettison." MSEA's Brief at 36. However, the Nonmembers plainly stated that this Court should adopt "a 'bargaining-unit standard' [that] is actually Justice Scalia's 'statutory-duties' test with teeth," Pet. Brief at 52 (citation omitted).[19] Those "teeth," under

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[18]Ironically, the Solicitor General criticizes the Nonmembers' request to revisit *Lehnert*, while revisiting it himself by proposing to require evidence demonstrating a "*bona fide* [litigation] pooling arrangement." Solicitor's Brief at 15-20.

[19]The Nonmembers do not argue that the three-part test for chargeability adopted by the Court in *Lehnert*, 500 U.S. at 519, is *necessarily* erroneous. As Justice Scalia suggested in that case, the "'germane' to collective-bargaining activity" part of that test "could, if properly elaborated, stand for" his statutory-duties test. *Id.* at 557 (Scalia, J.). The Nonmembers maintain that, by virtue of logic, strict (continued...)

Maine's statutory regime (and those in virtually every state with public-sector collective-bargaining statutes), limit the bargaining agent's duties to the bargaining unit, and hence, limit the nonmembers' compelled fee obligation to the collective bargaining and contract administration activities occurring in the bargaining unit. *See id.* at 43-53.

Under this test, the touchstone for chargeability is, in the first instance, the scope of a State's statutory bargaining authorization. Such a test thus has the immediate virtue of satisfying this Court's doctrine of constitutional avoidance. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 280 n.12 (2003) ("the constitutional avoidance doctrine counsels us to adopt constructions of statutes to 'avoid decision of constitutional questions,' not to deliberately create constitutional questions") (citations omitted) (Thomas, J., concurring in part, dissenting in part). And although it would allow bargaining representatives to charge nonmembers for the bargaining-related services provided to them by their affiliates, it would avoid the difficulties occasioned by *Lehnert*'s confusing and malleable standard. 500 U.S. at 550 (Scalia, J.) ("today's opinion both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop"), and 563

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[19](...continued)
scrutiny, and due regard for the concept that the "government's vital policy interest" as defined by the statute, the three-part test inevitably leads to a statutory duties test, particularly as applied to extra-unit expenditures. The confusion that the three-part test has sown on this issue in the courts below demonstrates the need for the clarification that Justice Scalia anticipated. *Id.* at 550.

("the majority discerns an altogether malleable three-part test for the chargeability of expenses") (Kennedy, J.).

MSEA correctly observes that the Nonmembers' Question Presented relies upon *Lehnert*. MSEA's Brief at 36. But as it did with success in the court below, MSEA offers pages of argument—relying upon *Lehnert*'s dissenters—that the Nonmembers' understanding of *Lehnert* is erroneous. MSEA's Brief at 13-35. Certainly the Nonmembers are entitled to counter by arguing that the *Lehnert* majority's vague test permitting unions to charge for affiliate expenditures "for [extra-unit litigation] services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization," *Lehnert*, 500 U.S. at 524, is itself hopelessly confusing and flawed.

The Court "has never felt constrained to follow precedent," particularly in constitutional cases, such as *Lehnert*, "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," or where they "have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts." *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991), *quoting, among others, Smith v. Allwright*, 321 U.S. 649, 665 (1944). Indeed, "[t]he Court has not always confined itself to the set of issues addressed by the parties," *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999). On occasion, the Court has even overruled cases, despite the parties' consensus that existing precedent was controlling. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 319-21, 320, n.6 (1971).

MSEA's reliance upon *Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992), is misplaced. *Yee* was a "takings clause" case involving petitioners who specifically challenged in their Question Presented only whether a local ordinance constituted a compensable *physical* taking of their property. However, in briefing before this Court, *Yee*'s petitioners argued that the ordinance at issue constituted a *regulatory* taking. The Court declined to consider this distinctly separate argument, which raised a question that this Court had never before addressed, as outside the scope of the question presented, citing prudential concerns. *Id.* at 538.

This case is distinct from *Yee*. Here, the confusion among the lower courts—and the consequent need for clarification—*arises from* this Court's badly-splintered decision in *Lehnert*. There a majority set forth one standard as to extra-unit expenditures generally, 500 U.S. at 524, but four of those five Justices determined that it did not apply to extra-unit litigation, *id.* at 528 (Blackmun, J.). The remaining four Justices adopted a *different* standard for the chargeability of extra-unit expenses generally, *id.* at 561, but, except for Justice Kennedy, did not explicitly address its application to extra-unit litigation.[20] And even if one assumes that

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[20] However, Justice Scalia's opinion implicitly found extra-unit litigation did not meet his general test, because that opinion quoted *Ellis*' holding on extra-unit litigation and immediately thereafter said that "there is good reason to treat [*Ellis* and the Court's other statutory cases] as merely reflecting the constitutional rule." 500 U.S. at 555. Moreover, although Justice Scalia explicitly expressed disagreement with Justice Blackmun as to a number of activities Justice Blackmun found chargeable, his opinion nowhere stated disagreement with Justice Blackmun's conclusion that the First (continued...)

Justice Kennedy agreed with Justice Marshall that extra-unit litigation expenditures are lawfully chargeable, Justice Kennedy disagreed with the majority's standard, joining in Justice Scalia's "statutory-duties" test. *Id.* at 562-63. These divergent views have led to confusion in the lower courts that should be clarified here.

This case is more closely analogous to *Nevada v. Hicks*, 533 U.S. 353, 370 n.9 (2001). In *Hicks*, this Court responded to criticism that it had exceeded the scope of the Question Presented by adjudicating an Indian tribe's regulatory jurisdiction on tribal land, when it was a case about tribal "civil adjudicatory jurisdiction," *id.* at 396-97 (O'Connor, J., concurring in part and concurring in the judgment). The Court noted that the case cited and relied upon in the petition "dealt only with regulatory authority, and [was] tied to adjudicatory authority by [another case]." *Id.* at 370 n.9. This Court held that it could properly adjudicate the broader issue because the merits briefing "made clear" that the two issues were intertwined.

Here, as in *Hicks*, whether *Lehnert* sets a standard for extra-unit expenditures that, in addition to being confusing to the lower courts and prospective litigants, is overly broad as applied to extra-unit litigation expenditures, is intertwined sufficiently in the Question Presented for the Court to consider it as "fairly included" under this Court's Rule 14.1(a).

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[20](...continued)
Amendment prohibits charging objecting nonmembers for extra-unit litigation.

IV. The Solicitor General's Suggestion of Remand Is Not Well Taken.

If the Court allows a union to charge objecting nonmembers for any "pooled" activities, the Nonmembers agree that it should *only* be pursuant to a proven, formalized arrangement or agreement, as the Solicitor General argues. Solicitor's Brief at 24-29. The "agency shop itself is 'a significant impingement on First Amendment rights.'" *Hudson*, 475 U.S. at 307 n.20 (*quoting Ellis*, 466 U.S. at 455). Certainly, the amorphous and discretionary relationship between MSEA and SEIU, *see supra* pp. 16-21, does not "provide procedures that minimize that impingement." *Hudson*, 475 U.S. at 307 n.20.

Although the Nonmembers find little accord with MSEA, they agree—for different reasons—that the Solicitor General's suggestion of remand to allow MSEA "to prove that the pooling arrangement is bona fide under" the standard the Solicitor General proposes, Solicitor's Brief at 7-8, 28-29, is not well taken.

The Solicitor General's standard is that units participating in a "litigation pool . . . must have a reasonable assurance—by contract, by practice or usage, or by some other means—that the pool will pay for their litigation expenses when needed." *Id.* at 28. However, MSEA concedes that all that it has with SEIU is "a prototypical affiliation relationship with a parent union." MSEA's Brief at 45. MSEA also concedes that, "in an affiliation relationship, a local union does not have a guarantee that, in any particular year, it will receive assistance from the parent union." *Id.* at 20 n.9.

In short, MSEA has already conceded that it cannot satisfy the Solicitor General's test for a "bona fide pooling arrangement." Consequently, no remand to take proof of the arrangement between MSEA and SEIU is necessary, even if the Court accepts the Solicitor General's (erroneous) reading of *Ellis* and recasting of *Lehnert*'s standard for the chargeability of extra-unit litigation.

Conclusion

The judgment below should be reversed, and remanded for entry of judgment in favor of Petitioners, and further proceedings consistent with the Court's opinion.

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11 September 2008

AMICUS CURIAE BRIEF

File Date:
May 12 2008

No. 07-610

In the Supreme Court of the United States

DANIEL B. LOCKE, ET AL., PETITIONERS

v.

EDWARD A. KARASS, STATE CONTROLLER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether or to what extent a public-sector union may, consistent with the First Amendment, charge nonmembers for litigation funded through a pooling arrangement with other unions.

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In the Supreme Court of the United States

No. 07-610

DANIEL B. LOCKE, ET AL., PETITIONERS

v.

EDWARD A. KARASS, STATE CONTROLLER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment prohibits a union representing public-sector employees from charging nonmembers for litigation funded through a pooling arrangement with other unions. The Secretary of Labor is responsible for advising the President with respect to national labor policy and carrying out Congress's purpose "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." 29 U.S.C. 551. The United States has participated as an amicus in other litigation presenting constitutional questions concerning nonmembers' compelled fees. *E.g.*, *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2377 (2007). For those reasons, the United States has a

substantial interest in the resolution of the question presented.

BACKGROUND

1. Under this Court's decisions, States have flexibility to permit or prohibit "union shop" and "agency shop" arrangements in public and private workplaces. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 225-226 (1977); *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 233 (1956). Under a "union shop" arrangement, a union and employer enter into a collective bargaining agreement that requires all employees who benefit from collective bargaining to join the union. By contrast, under an "agency shop" agreement, employees do not have to join the union, but must nonetheless pay a "service" or "agency" fee to the union for representational activities. Even when such arrangements are permitted, however, a union may not use an objector's compelled fees, against his will, for activities that are not germane to collective bargaining. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984).

2. Respondent Maine State Employees Association, Service Employees International Union Local 1989 (MSEA) is the exclusive bargaining representative for certain workers employed in Maine's executive branch. Pet. App. 3a. It operates pursuant to an agency-shop arrangement. Under its collective bargaining agreement, MSEA is required to represent all workers in the bargaining unit, including nonmembers, and in return is permitted to collect a service fee from the nonmembers. *Ibid.*; see *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1979). Between April and July 2005, MSEA sent a series of notices to nonmembers that ultimately informed them that, effective July 1, 2005, their biweekly

service fee would be $8.94, approximately 49% of the amount that each MSEA member paid in dues. See Pet. App. 4a-6a; J.A. 50.[1]

MSEA's final notice explained that, in calculating the service fee, the union charged nonmembers for representational activities but not for non-representational activities such as public relations, lobbying, and other political activity. See Pet. App. 5a; J.A. 53-59, 61-62. MSEA also charged nonmembers for the portion of the affiliation fee that it paid to its international union, the Service Employees International Union (SEIU), that was attributable to SEIU's representational activities. See Pet. App. 5a; J.A. 58, 62. Litigation by both MSEA and SEIU was charged to nonmembers if it was "related to the union's representational activities (i.e., grievances, collective bargaining rights, etc.)." J.A. 54; see Pet. App. 5a. Although the record does not specify the precise amount of fees attributable to such litigation, it does reflect that the amount is no more than 30 cents per month for each nonmember paying agency fees. Pet. App. 37a.

3. Petitioners are 20 nonmembers who must pay service fees to MSEA. See J.A. 28-29. They filed this suit in June 2005, alleging violations of the First, Fifth, and Fourteenth Amendments, and seeking declaratory and injunctive relief as well as damages and restitution from MSEA and state officials. J.A. 27-29, 44-46. As pertinent here, petitioners alleged that they should not have been charged for SEIU's "litigation that does not concern [a] dissenting nonmember's bargaining unit." J.A. 41. On cross-motions for summary judgment, the

[1] Through June 2006, some nonmembers were required to pay only 50% of the service fee. All nonmembers must now pay the full fee. Pet. App. 4a n.6.

district court held that "inclusion of the cost of extra-[unit] litigation" in the service fee "does not violate [petitioners'] constitutional rights." Pet. App. 58a.

4. The court of appeals affirmed. Pet. App. 1a-41a.

a. The court of appeals determined that "the chargeability of extra-unit litigation 'lies in the intersection of the *Ellis* and *Lehnert* holdings.'" Pet. App. 27a (quoting *Otto* v. *Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 135 (3d Cir.), cert. denied, 540 U.S. 982 (2003)). This Court's decision in *Ellis*, the court explained, held that "nonmembers cannot be charged for litigation that does not "'concern' their own bargaining unit." *Ibid.* The court of appeals emphasized, however, that "the *Ellis* Court was not confronted with a pooling arrangement"—*i.e.*, "an agreement between a local union and a state or national union, by which the local contributes money to the state or national union, with the understanding that the latter will provide services, personnel, and resources to the local unit when that local needs them." *Id.* at 2a n.2; see *id.* at 27a. Rather, the court of appeals determined, *Ellis* "pertained only to the direct contribution of local union monies to litigation efforts by other units (or by a national affiliate)—meaning contributions to litigation expenses given without expectation of reciprocal contributions at a later time." *Id.* at 27a-28a.

In contrast, the court of appeals explained, *Lehnert* subsequently held that unions can charge nonmembers for contributions to a pooling arrangement "even if [the] activities [funded through the pooling arrangement] were not performed for the direct benefit of the objecting employees' bargaining unit." Pet. App. 17a-18a. The court of appeals reasoned that such an arrangement is "akin to insurance, whereby the local unit contributes

certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them." *Id.* at 29a. For a pooling arrangement to be legitimate under *Lehnert*, the court determined, "charged expenditures must be (1) substantively related to collective bargaining, and (2) 'for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 18a (quoting *Lehnert*, 500 U.S. at 524).

In the court of appeals' view, therefore, "[t]he funding mechanism used is critical." Pet. App. 30a. *Ellis* governs contributions made to other units' litigation efforts with "no reasonable expectation of any return benefit," *id.* at 29a-30a, the court held, while *Lehnert* applies when the contributing unit has "specific reassurance that future litigation directly relating to [its] unit would be funded by other units," *id.* at 22a n.13.

In this case, the court of appeals understood petitioners to "have argued only that, as a matter of law, * * * the costs associated with [other units' litigation] could not be charged to nonmembers" under any circumstances. Pet. App. 31a. Having rejected that categorical contention, the court of appeals affirmed the judgment of the district court. *Id.* at 32a.

b. In a concurring opinion (Pet. App. 35a-41a), Judge Lynch emphasized that "[e]xtra-unit litigation expenses are not analytically different from other pooled extra-unit expenses," and should therefore be governed by the same standards that govern the pooling of other expenses under *Lehnert*. *Id.* at 38a.

SUMMARY OF ARGUMENT

A. A State may require public employees within a bargaining unit to contribute to their own unit's collective-bargaining costs, in part because members and nonmembers alike benefit from collective bargaining. But the First Amendment limits the types of other expenses that nonmembers may be required to pay. As pertinent here, in *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), this Court held that objectors could not be compelled to contribute to costs of other units' litigation—litigation that workers who do not wish to associate with a union in the first place typically do not want to fund.

B. The question in this case, however, is not whether dissenters can be charged for *other units'* litigation. Instead, it is whether a unit that funds its *own* litigation through an insurance or other risk-sharing arrangement may charge dissenters for their pro rata share of the cost of the arrangement. While *Ellis* did not address that question, this Court subsequently held in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that, in at least some circumstances, a union can use compelled fees to enter into pooling arrangements with other units. Under such arrangements, local bargaining units pay fees to a state, national, or international affiliate, which then assists with the local's collective-bargaining activities, as needed. Such arrangements can benefit members and nonmembers alike by enabling each unit to spread risk and smooth out payments over time.

There is no reason to treat a unit's litigation costs differently from its other expenses for this purpose. Whether the pooled costs relate to the negotiation of collective bargaining agreements (as in *Lehnert*) or the litigation of disputes arising under them, the legal prin-

ciple is the same, because each unit is essentially buying an insurance policy to cover its own future expenses. As long as a union can use compelled fees to purchase litigation insurance from a commercial insurer, there is no reason it cannot use such fees for a bona fide litigation pooling arrangement with affiliated unions.

C. That constitutional justification for litigation pooling arrangements imposes important limits on their scope. As *Lehnert* held, such an arrangement must concern activities "associated with otherwise chargeable activities." 500 U.S. at 524. If the unit involved in a particular case could not charge *its own* objectors for the litigation because it was not germane to collective bargaining, objectors in *other units* certainly could not be expected to contribute to a pooling arrangement covering the litigation. In addition, a bona fide pooling arrangement requires that each participating unit pay its fair share of the costs, and that each have a reasonable assurance that, when needed, the national or international affiliate will assist with its germane litigation. If a pooling arrangement is designed to address some but not all germane litigation, it must have reasonably ascertainable standards for determining which litigation is included and which is not. In other words, the arrangement must be a bona fide risk-sharing one, analogous to an insurance policy, as opposed to a vehicle for some units to subsidize other units' litigation with compelled fees. And "as always, the union bears the burden of pro[of]" on the chargeability of expenses, including pooled expenses. *Lehnert*, 500 U.S. at 524.

D. Petitioners here carried their threshold burden by objecting to SEIU's litigation expenses insofar as they do not concern petitioners' bargaining unit. At that point, the burden shifted to respondents to prove that

the pooling arrangement is bona fide under the standard discussed above. Because the court of appeals applied a different standard in reviewing the validity of the fees at issue, and because the record before this Court does not disclose whether the proper standard is satisfied, the Court should remand the case so that the lower courts may review the fees at issue under the proper standard.

ARGUMENT

UNIONS MAY USE COMPELLED FEES FOR BONA FIDE POOLING ARRANGEMENTS UNDER WHICH A PARENT UNION AGREES TO COVER THE COSTS OF ITS AFFILIATES' GERMANE LITIGATION

A. Public Employees Cannot Be Compelled To Support Litigation That Does Not Directly Concern Their Own Bargaining Unit

The court of appeals correctly held that, if MSEA were simply funding the litigation efforts of other units, it could not use compelled fees for that purpose. Pet. App. 27a-28a.

1. Agency-shop and union-shop arrangements directly impact the First Amendment interests of workers who are compelled by state law to pay fees to a union they do not wish to join. *Davenport* v. *Washington Educ. Ass'n*, 127 S. Ct. 2372, 2377 (2007); see *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 301, 305 (1986). Individuals, including government employees, ordinarily have a First Amendment right not to associate with other private persons or entities—including the right not to be forced to provide financial support for other peoples' causes. See *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 557-559 (2005); *Davenport*, 127 S. Ct. at 2378 ("[I]t is undeniably un-

usual for a government agency to give a private entity the power, in essence, to tax government employees."); *Hudson*, 475 U.S. at 301-302 & n.9. Moreover, because "[u]nions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints," *Lehnert*, 500 U.S. at 516, "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by [a] union." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

The right not to associate is, however, not absolute. And in order to further "the government's interest in promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany union recognition," the government may require public employees to pay agency- or union-shop fees. *Lehnert*, 500 U.S. at 520-521. This Court has explained that, because unions are legally obligated to represent *all* employees in a bargaining unit, even those who do not join the union, the government has a legitimate interest in requiring all such employees to contribute to the union's collective-bargaining activities. *Abood*, 431 U.S. at 221-222; see *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1979). Such union- and agency-shop arrangements promote labor peace by "prevent[ing] nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 127 S. Ct. at 2377; see *Abood*, 431 U.S. at 221-222, 224-225.

Nonetheless, because "allowing the union shop at all" is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455-456; see *Hudson*, 475 U.S. at 301; *Abood*, 431 U.S. at 222, the constitutionally permissible scope of compelled fees is limited by the labor-peace and free-rider rationales on which they rest. See

Lehnert, 500 U.S. at 520-521; *id.* at 556-557 (Scalia, J., concurring in the judgment in part and dissenting in part); *Ellis*, 466 U.S. at 447-448. Thus, while a union may charge dissenting employees for the costs of its "collective bargaining, contract administration, and grievance adjustment," *Abood*, 431 U.S. at 225-226, "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519.

Unions are free to engage in other activities and to spend their voluntarily raised funds on those activities. But a union cannot take the "extraordinary" step of "acquir[ing] and spend[ing] *other people's* money," against their will, for such purposes. *Davenport*, 127 S. Ct. at 2380; see *Abood*, 431 U.S. at 235-236.

2. Under those standards, litigation costs can be charged to objecting employees only when the litigation *both* is germane to collective bargaining *and* "directly concern[s]" the employees' bargaining unit. *Ellis*, 466 U.S. at 453.

a. This Court unanimously held in *Ellis* that "[t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising *in the bargaining unit* are clearly chargeable * * * as a normal incident of the duties of the exclusive representative." *Ellis*, 466 U.S. at 453 (emphasis added). The Court further held that "[t]he same is true of fair representation litigation arising *within the unit*, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns *bargaining unit employees* and is normally con-

ducted by the exclusive representative." *Ibid.* (emphases added). However, the court continued, "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Ibid.* "[U]nless the [relevant] bargaining unit is directly concerned," the "objecting employees need not share the costs" of the litigation. *Ibid.* As the court of appeals explained, the upshot is that unwilling members of *one* bargaining unit cannot be charged for the costs of *other* units' litigation unless that litigation directly concerns the bargaining unit, even if the litigation were germane to the other units' collective bargaining and thus chargeable to objecting members of those specific units. Pet. App. 13a.[2]

Ellis directly interpreted the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, not the First Amendment. But *Ellis* and this Court's other RLA cases rest on principles of constitutional avoidance, not on a parsing of the RLA's text. See *Ellis*, 466 U.S. at 444; *Abood*, 431 U.S. at 232 (discussing RLA cases); cf. *IAM* v. *Street*, 367 U.S. 740, 742 n.1, 750-770 (1961) (relegating text of RLA to a footnote and discussing legislative history and constitutional avoidance principles at length). Thus, "there is good reason to treat [*Ellis* and other statutory cases]

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[2] Litigation directly concerns a bargaining unit when the unit is a party to the litigation. The fact that one unit's litigation may create a precedent that could affect other units is insufficient to establish that the litigation directly concerns those units. This case presents no occasion to consider whether a unit may establish a direct interest in litigation involving other parties based on other considerations, such as where a collective bargaining agreement expressly ties the non-party unit's rights to the rights of another unit under another collective bargaining agreement. In any event, as explained below, the union assessing the fees bears the burden of proving that the litigation directly concerns the unit responsible for the fees.

as merely reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part); see *id.* at 516; *Hudson*, 475 U.S. at 303-305 (relying on *Ellis*); *Abood*, 431 U.S. at 226, 232. Indeed, a four-Member plurality confirmed in *Lehnert* that, "[j]ust as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation * * * the Amendment proscribes such assessments in the public sector." 500 U.S. at 528. Justice Scalia, in an opinion joined by three other Justices, likewise agreed that *Ellis* "reflect[s] the constitutional rule." *Id.* at 555 (concurring in the judgment in part and dissenting in part).

b. *Ellis*'s unanimous holding reflects the constitutional distinction between activities undertaken as part of negotiating and administering a unit's collective-bargaining agreement or settling disputes under that agreement, which are generally chargeable to objectors, and other activities undertaken to promote union interests more generally, which are not chargeable to workers who object to union membership in the first place. A unit might choose to contribute its voluntarily raised funds to another unit's litigation efforts on the theory that the litigation could have precedential significance for all units, and thus indirectly benefit the contributing unit. In a variety of contexts, however, this Court has made clear that the First Amendment precludes charging objectors for similar matters.

For example, political and lobbying activities concerning the election of pro-union candidates or enactment of pro-union legislation may well strengthen a union and improve its bargaining position. Under the First Amendment, however, lobbying activities are not

chargeable to objectors unless they specifically "relate * * * to the ratification or implementation of a dissenter's collective-bargaining agreement." *Lehnert*, 500 U.S. at 520 (plurality opinion); accord *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). Similarly, public-relations expenses that are not "oriented toward the ratification or implementation of [a unit's] collective-bargaining agreement" are not chargeable to objectors, even though they may strengthen the union's bargaining position. *Id.* at 527 (plurality opinion); see *id.* at 559 (Scalia, J., concurring in the judgment in part and dissenting in part). This Court has likewise construed the RLA not to permit unions to charge objectors for union organizing activities, even though those activities may improve the union's bargaining position. *Ellis*, 466 U.S. at 451-453.

Such efforts to "expan[d] * * * overall union power," beyond the negotiation and administration of a unit's collective-bargaining agreement, or the settling of disputes under it, fall outside of the free-rider rationale for compelled agency fees. *Ellis*, 466 U.S. at 451, 452-453. So too here, litigation by affiliated unions may strengthen MSEA's position, but because such litigation is not part of the negotiation or administration of MSEA's own collective bargaining agreement, or the settling of disputes under that agreement, it is not chargeable to objectors. As the *Lehnert* plurality explained, litigation is "akin to lobbying" in that respect. 500 U.S. at 528.

In addition, charging objectors for other units' litigation would "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. This Court "long ha[s] recognized the important political and expressive

nature of litigation." *Id.* at 528 (plurality opinion) (citing *NAACP* v. *Button*, 371 U.S. 415, 431 (1963)). A union's position in litigation—especially litigation concerning the rights and obligations of unions—may well be offensive to workers who do not wish to associate with a union in the first place. While the very concept of an agency shop requires objectors to contribute to their own unit's germane litigation, it does not require objectors to support other units' litigation.[3]

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[3] The National Labor Relations Board (NLRB) has explained that this Court "considered in *Ellis* and *Lehnert* the question of extra-unit litigation expenses affecting employees governed by the [RLA] and public sector labor statutes, respectively, and has held those expenses nonchargeable to objectors." *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995) (footnotes omitted), enforced *sub nom. IAM* v. *NLRB*, 133 F.3d 1012, 1016 (7th Cir.), cert. denied, 525 U.S. 813 (1998). In administering the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, however, the NLRB has declined to apply that constitutional holding because the NLRB "find[s] precedent grounded in constitutional considerations not to be binding in the context of the NLRA." *California Saw*, 320 N.L.R.B. at 238; accord *United Food & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730, 736 (1999), enforcement granted in part and denied in part *sub nom. United Food & Commercial Workers Union, Local 1036* v. *NLRB*, 307 F.3d 760 (9th Cir.) (en banc), cert. denied, 537 U.S. 1024 (2002).

As this Court has explained, state action triggering First Amendment protections is clearly present in the government-employment context and is also present under the RLA because that statute preempts state laws concerning union- and agency-shops. *Abood*, 431 U.S. at 218 n.12, 226; *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 232 (1956). But because the NLRA concerns private employment arrangements and does not preempt state law concerning the permissibility of union- and agency-shops, the NLRB has determined that the NLRA does not involve state action on this issue. See *California Saw*, 320 N.L.R.B. at 227-228. This Court has reserved that question while acknowledging that "the NLRA and RLA differ in certain crucial respects." *Commu-*

B. If A Bargaining Unit Funds Some Or All Of Its Own Germane Litigation Through A Bona Fide Pooling Arrangement, Nonmembers May Be Compelled to Contribute To The Pooling Costs

Although the First Amendment precludes public-sector unions from charging objectors for *other units'* litigation that does not directly concern the objector's unit, it does not preclude unions from using compelled fees to fund their *own* germane litigation either directly or through insurance or other bona fide pooling arrangements. In any given year, pooled funds might be used to fund the litigation of an objector's unit or another unit. But regardless of whether the objector's own unit calls on the pooled funds in a given year, a bona fide pooling arrangement is a constitutionally permissible way of funding the unit's own potential litigation. The bottom line is that the cost of other units' litigation that does not directly concern an objector's unit is not chargeable, but the cost of an insurance policy for the unit's own germane litigation costs is chargeable.

1. Unions may charge objectors for germane litigation expenses that are funded through insurance or other bona fide pooling arrangements

A unit might fund its own germane litigation in multiple ways. One approach would be to adjust fees every year to cover the costs of litigation incurred during that year. That approach could cause fees to fluctuate wildly from year to year, however, because a unit might have low litigation costs in most years, but litigation costs

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nications Workers of Am. v. *Beck*, 487 U.S. 735, 745, 761 (1988). Thus, NLRB precedents are inapposite in cases (like this one) that are controlled by constitutional principles.

might spike in certain years, such as when a strike occurs. A unit might try to even out members' and nonmembers' fees over time by establishing its own litigation reserve fund, but that approach would still expose the unit to the risk that, for unpredictable reasons, it might incur unusually high litigation costs compared to the average. Thus, a unit-by-unit funding mechanism imposes financial risks on members and nonmembers alike.

To protect against those risks, a unit might purchase a litigation insurance policy from a commercial insurer. Insurance is a common way of reducing risk and evening out payments over time. *E.g.*, *Adams* v. *Plaza Fin. Co.*, 168 F.3d 932, 934 (7th Cir. 1999). Like other entities, unions presumably purchase insurance policies to cover a variety of matters, such as fire or flood damage to a union's headquarters. A union's use of compelled fees to fund its own germane activities through insurance would present no constitutional question, because such a financial-management practice would not increase the intrusion on First Amendment interests that is inherent in the union- or agency-shop. See *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) ("The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'") (quoting *Ellis*, 466 U.S. at 456) (brackets in original); *Abood*, 431 U.S. at 223 (holding that an objector "cannot withdraw his financial support merely because he disagrees with the group's strategy").

As the court of appeals recognized, a similar analysis applies to bona fide pooling arrangements, "akin to insurance," under which multiple units make payments to a pool and the pool agrees in turn to "provide resources

(in the form of services or money) in return, when the local unit needs them." Pet. App. 29a. If a unit can use compelled fees to fund its own germane litigation by purchasing a commercial insurance policy, there is no constitutional impediment to its use of compelled fees to fund such litigation through a bona fide pooling arrangement administered by its national or international affiliate.

Indeed, a national or international union is well positioned to provide insurance-type services for its local affiliates. As this Court recognized in *Lehnert*, "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them." 500 U.S. at 523. "Consequently," the Court explained, "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." *Ibid.*

Lehnert therefore held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 500 U.S. at 524. To be clear, "[t]his conclusion * * * does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Ibid.* Instead, "[t]here must be some indication that the payment is for services that may ultimately inure to the

benefit of the members of the local union by virtue of their membership in the parent organization." *Ibid.*

2. There is no basis for overruling* Lehnert*'s unanimous endorsement of pooling arrangements

Petitioners appear to suggest (Br. 39, 50-52) that this Court should overrule *Lehnert* and hold that units may not use compelled fees for *any* pooling arrangements. That position falls outside of the far narrower question presented, which affirmatively *relies* on *Lehnert*. Pet. (i); see *Yee* v. *City of Escondido*, 503 U.S. 519, 535-537 (1992) (holding that petitioners had excluded a related argument from the scope of the question presented by drafting it narrowly). The body of the petition for a writ of certiorari likewise relied heavily on *Lehnert*, without suggesting that it be overruled. See Pet. 1, 9, 12-15. Accordingly, this Court could decline to consider petitioners' attack on *Lehnert*. See Sup. Ct. R. 14.1(a).

In any event, *Lehnert*'s endorsement of pooling arrangements is entitled to stare decisis effect. While the *Lehnert* Court divided on some questions, every Member of the Court agreed that unions may pool compelled fees for at least some purposes. See *Lehnert*, 500 U.S. at 523-524; *id.* at 562 (Scalia, J., concurring in the judgment in part and dissenting in part) ("It is a tangible benefit * * * to have expert consulting services on call, even in the years when they are not used."); *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[W]e permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncontractual consulting or legal services plan.").

Petitioners primarily argue (Br. 22-23) that one unit's litigation is inherently not germane to another unit's collective bargaining. As discussed above, however, it does not follow that the costs associated with a unit's decision to buy insurance for its *own* litigation costs through an insurance policy or other pooling arrangement are not germane to its collective bargaining. While petitioners suggest (Br. 42) that unions should not be able to evade limitations on chargeability through "creative accounting and shell-game-like shifting of nonmembers' funds," risk-sharing agreements are not inherently sinister. They are commonly used commercial arrangements that provide important benefits to all participants. See pp. 15-16, *supra*. Moreover, the way to ensure that legitimate risk sharing does not become a cover for improper efforts to appropriate nonmembers' funds for nongermane activities is through a proper allocation of the burden of proof. See pp. 28-29, *infra*.

Petitioners assert (Br. 14) that the First Amendment requires the government to use the least restrictive means to further its interest in promoting labor peace and preventing free riders. Cf. *Hudson*, 475 U.S. at 303 (holding that "the procedure" for protecting dissenters' First Amendment rights must "be carefully tailored to minimize the infringement"). Even assuming *arguendo* that a least-restrictive-means test applies, prohibiting unions from using compelled fees for pooling arrangements would require them to choose between foregoing an efficient means of spreading risk, on the one hand, or permitting free riders, on the other. That could give rise to the very type of labor friction that agency shops are designed to prevent.

Moreover, such pooling arrangements do not "significantly add to the burdening of free speech that is inher-

ent in the allowance of an agency or union shop" (*Lehnert*, 500 U.S. at 519), because objectors must pay for their unit's germane activities in any event. Even objectors may benefit from spreading out litigation costs rather than facing a substantial assessment in a single period. There is no reason to place objectors in a better position merely because a unit chooses to fund its own germane expenses through a risk-sharing mechanism as opposed to other means. Although it might be an appropriate policy judgment for a legislature to limit local unions to buying third-party insurance as a prophylactic means of ensuring that a national union does not use pooling as a cover for impermissible cost shifting, the First Amendment itself does not embody that prophylactic rule.

As *Lehnert* explained, unions are entitled to "some leeway" in exercising "the flexibility and discretion necessary to accommodate the needs of their constituents." 500 U.S. at 525 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)); see *Abood*, 431 U.S. at 222-223; *Ellis*, 466 U.S. at 456-457. Such leeway is particularly appropriate for financial-management decisions concerning the best way to fund germane activities. Nothing in the Constitution distinguishes between the use of compelled fees to pay a unit's costs directly, to purchase commercial insurance for such costs, or to enter into a bona fide pooling arrangement.

3. There is no reason to exclude litigation costs from the scope of permissible pooling arrangements

Petitioners argue (Br. 9) that *Ellis* and *Lehnert* excluded litigation costs from the scope of permissible pooling arrangements. But neither case so holds, and the logic of *Lehnert* strongly suggests that using com-

pelled fees for the pooling of litigation expenses is permissible for the same reasons that it is permissible for other expenses.

a. Relying on factual recitals in a district court decision in the *Ellis* litigation, petitioners argue (Br. 21-22 & n.12) that *Ellis* involved a pooling arrangement because the nonmembers paid part of their dues directly to the national union, which undertook the relevant litigation. Assuming that factual description is accurate, it does not follow that *Ellis* involved a bona fide risk-sharing arrangement among affiliated unions. Among other things, that would depend on whether the payments to the national union were made in return for the national's agreement to cover each unit's germane litigation, or instead were paid into a discretionary fund for the national to use as it pleased. See pp. 24-28, *infra*.

In any event, as Justice Kennedy has observed, "*Ellis* * * * contains no discussion of whether a local bargaining unit might choose to fund litigation * * * through a cost-sharing arrangement." *Lehnert*, 500 U.S. at 564 (concurring in the judgment in part and dissenting in part). Indeed, this Court's opinion in *Ellis* does not even indicate whether there was a pool in that case. Instead, *Ellis* addressed only the question whether objectors in one unit can be required to support other units' litigation, without addressing the pooling question presented here. Pet. App. 27a-28a; accord *Otto* v. *Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 136 (3d Cir. 2003), cert. denied, 540 U.S. 982 (2003); see *Ellis*, 466 U.S. at 453.

b. Nor did *Lehnert* resolve the question whether litigation expenses may be pooled. Four Members of the *Lehnert* Court determined that objectors could not be charged for pooled litigation costs. 500 U.S. at 528 (plu-

rality opinion). Justice Kennedy disagreed with that conclusion. *Id.* at 563-564. Justice Marshall reserved judgment on it. *Id.* at 549. And the remaining Members of the Court did not specifically address the litigation-costs question, see generally *id.* at 558-559 (Scalia, J., concurring in the judgment in part and dissenting in part), evidently because no such costs were actually at issue in that case, see *id.* at 544-545 (Marshall, J., concurring in part and dissenting in part).

Petitioners argue (Br. 27) that Justice Scalia's opinion endorsed *Ellis*, and should therefore be read as "implicitly conclud[ing]" that pooled litigation costs cannot be financed with compelled fees. Justice Scalia cited *Ellis*, however, for the distinct proposition that compelled fees may be used only for services a union is obligated to perform on behalf of all employees in the bargaining unit, including the unit's own germane litigation. *Lehnert*, 500 U.S. at 554-555. Justice Scalia did not suggest, much less definitively state, that a union could not fund its germane litigation through a pooling arrangement. To the contrary, in discussing other types of expenditures, Justice Scalia agreed that a unit's payment to its national union for "on-call services for use in the bargaining process" is chargeable to objectors. *Id.* at 561. Thus, Justice Scalia's reasoning *supports* the use of compelled fees for litigation pooling arrangements; it certainly does not *preclude* such use.

c. Indeed, under the logic of *Lehnert*, there is no basis for excluding litigation costs from the scope of pooling arrangements that can be funded with compelled fees. As Justice Kennedy explained, such an exclusion "makes little sense if we acknowledge * * * that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local

bargaining unit, in the nature of a prepaid but noncontractual consulting or legal services plan." *Lehnert*, 500 U.S. at 563-564 (concurring in the judgment in part and dissenting in part). In other words, the rationale for permitting pooling of litigation costs is the same as the rationale for permitting pooling of any other costs—the unit benefits from the availability of support services, even if its need for those services fluctuates from year to year. As Judge Posner has explained, therefore, the pooling of litigation costs is "analytically identical" to the pooling of other expenses. *IAM* v. *NLRB*, 133 F.3d 1012, 1016 (7th Cir.), cert. denied, 525 U.S. 813 (1998); see Pet. App. 38a (Lynch, J., concurring); *Otto*, 330 F.3d at 138-139; *Reese* v. *City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995), cert. denied, 519 U.S. 964 (1996).

The *Lehnert* plurality gave two reasons for treating litigation costs differently from other expenses: "the important political and expressive nature of litigation" and the "diverse range of areas" covered by such litigation. 500 U.S. at 528. While there are sound reasons for suspecting that much litigation may be non-germane, neither of those considerations provides any basis for treating as non-germane the costs of insurance that smooths the incidence of expenses for litigation that is, in fact, germane over various assessment periods. If a commercial insurance company sold a litigation insurance policy to each of the bargaining units, and used the proceeds to cover each unit's germane litigation costs as they arose, the situation would not be materially different. Either way, a nonmember might argue that a portion of his fees contributed to a pool of funds that was used to pay other units' litigation expenses. But either way, that would only reflect the nature of risk sharing and insurance. As long as the objector is assessed only

for truly germane expenses, the First Amendment should be indifferent whether litigation expenses are spread evenly across assessment periods through insurance or assessed only when incurred.

To be sure, litigation costs differ in some respects from the costs of negotiating a collective bargaining agreement, which *Lehnert* permitted to be pooled. See 500 U.S. at 527. While the provision of core support services such as bargaining assistance is "[t]he essence of the affiliation relationship," *id.* at 523, neither litigation nor risk pooling is inherently a function for the national union, as *Ellis* helps to confirm. Moreover, union litigation can be quite expressive and ideological, and can be directed toward the expansion of union power generally. Those differences do not, however, provide a constitutional reason to preclude the use of compelled fees for litigation pooling arrangements. Instead, they underscore the importance of ensuring that, under the standards discussed below, a litigation pooling arrangement is actually a bona fide risk-sharing agreement similar to insurance, as opposed to a vehicle by which some units use compelled fees to subsidize other units' litigation, in violation of *Ellis*.

C. To Be Bona Fide, A Litigation Pooling Arrangement Must Cover Germane Costs And Have The Essential Attributes Of Any Genuine Risk-Sharing Agreement

Petitioners argue (Br. 51, 52) that *Lehnert*'s endorsement of pooling arrangements has led to a vacuum of "non-existent, non-enforceable standards." That is incorrect. The constitutional justification for requiring nonmembers to contribute to litigation pooling arrangements supplies the standards, and the nature of the constitutional interest suggests that the burden of any un-

certainty in the standards should fall in favor of the objectors whose First Amendment rights are at stake.

At the outset, as *Lehnert* and the court of appeals recognized, a pooling arrangement must cover costs "associated with otherwise chargeable activities." 500 U.S. at 524; see Pet. App. 31a-32a. If the unit involved in a particular case could not charge objectors for its litigation costs because the litigation was not germane to collective bargaining, a pooling arrangement could not be used to evade the First Amendment's prohibition against the use of compelled fees for that litigation. Thus, if 70% of a pool's revenues were used for germane litigation, with the remainder used for non-germane litigation, objectors could be charged for only 70% of their unit's payments to the pool.

In addition, a bona fide litigation pooling arrangement must have the essential features of any risk-sharing agreement: each participating unit must pay its fair share of the costs, and each must have some reasonable assurance that, when needed, the pool will pay for its germane litigation. If the national or international union assists with some but not all germane litigation, it must have reasonably ascertainable standards for determining which litigation is included in the pooling arrangement. In other words, the arrangement must be a bona fide risk-sharing one. If a unit paid into a pool without reasonable assurance that it would receive assistance with its own litigation, the pool would not be a legitimate risk-sharing arrangement, but instead would be a vehicle by which dissenters' compelled fees were used to subsidize other units' litigation, in violation of *Ellis*.

The *Lehnert* Court touched on those points. It explained, for example, that "[t]here must be some indication that the payment is for services that may ultimately

inure to the benefit of the members of the local union." 500 U.S. at 524. If a unit pays more than its fair share of litigation pooling costs, the excess contribution would not satisfy that test, but instead would be "in the nature of a charitable donation [that] would not be chargeable to dissenters." *Ibid.*

That is not to say that the Constitution micro-manages the details of such arrangements by establishing rigid rules for apportioning their costs. The Constitution no more requires one particular method of accounting than it enacts Herbert Spencer's social statics. The point is simply that a true risk-pooling arrangement offends no constitutional principle, and the proper standard and allocation of burden of proof should be sufficient to protect the important First Amendment rights of objectors. At least some national unions charge all workers the same amount, regardless of the identity of their local unit. See *Pilots Against Illegal Dues* v. *ALPA*, 938 F.2d 1123, 1127 (10th Cir. 1991). Some courts have likewise noted that each unit paid its "pro rata" share of the "costs of union programs available to all bargaining units." *Wessel* v. *City of Albuquerque*, 299 F.3d 1186, 1195 (10th Cir. 2002); accord *Reese*, 71 F.3d at 623. Such a pro rata approach is an appropriate way of allocating pooled litigation costs. There may be other reasonable approaches as well. Whatever apportionment methodology is used, however, it must reflect a genuine pooling of risk and, and as discussed below, the burden rests with the union. Otherwise, the pooling arrangement would impermissibly serve "as a cover" for charging objectors for other units' litigation, in violation of the First Amendment. See *Lehnert*, 500 U.S. at 515 (quoting *Hanson*, 351 U.S. at 238).

Similarly, each participating unit must have a reasonable assurance that, when it finds itself a party to germane litigation, the pool will cover its costs. If the pool covers only some litigation, it must have reasonably ascertainable standards for determining which litigation the pool will pay for (*i.e.*, the scope of the risk-sharing agreement). In the absence of such standards, *Ellis* would control and bar the use of compelled fees for the pooling arrangement, because nonmembers would be asked to fund other units' litigation without any assurance that the fund would cover their own unit's litigation.

As the court of appeals explained, "specific reassurance that future litigation directly relating to [an objector's] unit would be funded" by the pool "creat[es] the reciprocity that was necessary to the *Lehnert* Court's approval of pooling arrangements." Pet. App. 22a n.13. If a unit contributed to a pool with "no reasonable expectation of any return benefit," there would be no bona fide risk-sharing agreement, and dissenters in one unit would simply be compelled to support other units' litigation, in violation of *Ellis*. *Id.* at 29a-30a; see *id.* at 28a. "The essence of the affiliation relationship is the notion that the parent *will* bring to bear its * * * resources when the local is in need of them." *Lehnert*, 500 U.S. at 523 (emphasis added).

That does not mean that contractual formalities, such as the drafting of formal insurance policies, must be followed. Every Member of the *Lehnert* Court agreed that "there is 'no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage.'" 500 U.S. at 532 n.6 (quoting *id.* at 561 (Scalia, J., concurring in the judgment in part and dissenting in

part)); see *id.* at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part). If compelled fees are to be paid into a litigation pool, however, participating units must have a reasonable assurance—by contract, by practice or usage, or by some other means—that the pool will pay for their litigation expenses when needed, and as explained below, the burden properly rests with the union on this point.

D. The Union Bears The Burden Of Proving That It Made The Challenged Expenditures Pursuant To A Bona Fide Pooling Arrangement

Petitioners argue (Br. 40-43, 51) that they would face hopeless practical problems in attempting to establish whether a union's expenditures were made pursuant to a bona fide pooling arrangement. "The nonmember's 'burden,'" however, "is simply the obligation to make his objection known." *Hudson*, 475 U.S. at 306 n.16. Once a worker raises an objection, "the union retains the burden of proof," in part because it possesses the relevant "facts and records." *Id.* at 306 (quoting *Abood*, 431 U.S. at 239 n.40); see *id.* at 307 n.18; *Brotherhood of Ry. Clerks* v. *Allen*, 373 U.S. 113, 118, 122 (1963). Thus, in distinguishing between legitimate and illegitimate pooling arrangements, *Lehnert* stressed that, "as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses." 500 U.S. at 524; see *Wessel* v. *City of Albuquerque*, 463 F.3d 1138, 1144 (10th Cir. 2006).

Here, petitioners carried their threshold burden by objecting to SEIU's "litigation that does not concern [a] dissenting nonmember's bargaining unit." J.A. 41. At that point, the burden shifted to respondents to prove that the pooling arrangement is bona fide under the

standard discussed above. The court of appeals did not consider whether the standard described above was met, however, in part because it applied a different "germaneness" inquiry in determining that the expenses at issue were chargeable. See, *e.g.*, Pet. App. 31a-32a. In addition, the record before this Court does not disclose whether the standard discussed above is satisfied. Accordingly, this Court should vacate the decision below and remand for further proceedings to give the lower courts an opportunity to review the validity of the litigation expenses at issue under the proper standard.[4]

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[4] Petitioners have argued throughout this litigation based on their interpretation of this Court's cases that litigation pooling arrangements are per se invalid—a contention the court of appeals correctly rejected. Pet. App. 31a-32a. Thus, in affirming the district court's dismissal of petitioners' suit, the court of appeals emphasized that it relied on petitioners' failure to "dispute whether the litigation charges were 'germane,' as that term was defined in *Lehnert*." *Id.* at 32a. Because the legal standard discussed above "alters the playing field in some important respects," however, remand is appropriate. *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995). On remand, the court of appeals may consider whether or to what extent petitioners waived any arguments concerning the invalidity of the fees at issue.

CONCLUSION

For the foregoing reasons, the Court should dispose of this case in accordance with the principles discussed above and remand for further proceedings consistent with the Court's decision.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

DANIEL B. LOCKE, *et al.*, on behalf of themselves and the class they seek to represent,

Petitioners,

v.

EDWARD A. KARASS, State Controller; REBECCA M. WYKE, Commissioner, Department of Administrative and Financial Services; KENNETH A. WALO, Director, Maine Bureau of Employment Relations; and MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

This Court granted certiorari on the following question:

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside a nonunion employee's bargaining unit?

However, an antecedent question, integral to the resolution of the granted question presented, is whether this Court should replace the open-ended and confusing three-part test set forth in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), with a more administrable standard.

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INTEREST OF AMICUS

The States employ a large proportion of the nation's public sector employees. Many States have enacted "agency shop" or "union shop" laws for their public employees. The Court's jurisprudence in this area has a significant impact on the States and on state employees. A simple, administrable standard is of great importance to State governments. The States would rather devote scarce resources to core state functions than to protracted litigation.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify a confusing area of the law. In a series of decisions, this Court struck a balance between the First Amendment rights of objecting nonmembers and the duty of a union to negotiate on behalf of those objecting nonmembers. Virginia does not suggest that the Court revisit these principles. In the Court's most recent decision on the subject, however, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), a fractured Court introduced a confusing and amorphous three-part test that is very difficult to administer. That test should be set aside.

This brief will begin by sketching the Court's jurisprudence in the area. Virginia then will discuss

the problems associated with the three-part *Lehnert* test, including its inherent unpredictability and its open-ended nature. This test has led to confusion in practice and has been criticized by the lower courts and in academic commentary. Because of the problems associated with *Lehnert*, Virginia urges the Court to adopt an alternative test suggested by the concurring and dissenting opinion in *Lehnert*. This alternative test is simpler and more manageable for litigants and the lower courts.

ARGUMENT

I. THE THREE-PART TEST ADOPTED IN *LEHNERT* IS NOT COMPELLED BY PRECEDENT.

A. Requiring Objecting Nonmembers to Contribute to Labor Unions Constitutes a Significant Impingement on the First Amendment Rights of Nonmembers.

This Court has recognized that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "[A] corollary of the right to associate is the right not to associate." *California Democratic*

Party v. Jones, 530 U.S. 567, 574 (2000).[1] In addition, just as limitations upon an individual's right to make a financial contribution implicate that individual's First Amendment interests, *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (*per curiam*), the fact that individuals are compelled to make contributions that can be used for political purposes also implicates their First Amendment rights. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

In light of these principles, forcing an objecting nonmember to pay dues to support a labor union interferes in two ways with his First Amendment rights. First, it forces the nonmember to support financially the labor union and the labor union's political activity relating to collective bargaining. Second, the employee is forced to associate with the union, thus violating his "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.* at 235.[2]

---

[1] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[2] This basic premise has roots that run deep in our nation's history. For example, the Virginia Act for Religious Freedom, drafted by Thomas Jefferson in 1786, states that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *See Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (quoting the Act).

B. The First Amendment Sharply Limits Compulsory Assessments that Can Be Extracted from Nonmembers.

These First Amendment principles operate in tension with "agency shop" or "union shop" laws, which require dissenting nonmembers to contribute to the union.[3] In *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 233 (1956), this Court held that Congress could require dissenting nonmembers to join a union shop.[4] The Court noted that while First Amendment problems might arise if "'assessments' are in fact imposed for purposes not germane to collective bargaining," those problems were not "presented by this record." *Id.* at 236-38.

The reason a union can compel such payments is because the union, as the exclusive bargaining representative, must fairly and equitably represent all employees, regardless of whether they belong to the union. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761 (1961). Otherwise, nonmembers could act as "free riders" that benefit from the union's efforts without contribution. Therefore, the Court noted, the

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[3] With an "agency shop," employees are not required to join the union, but they are required to pay the union an amount equal to union dues. In "union shops," employees are required to join a union within a short time after being hired. *Oil, Chemical & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1 (1976).

[4] In *Hanson*, this Court found that state action was present. *Hanson*, 351 U.S. at 232.

"essential justification for authorizing the union shop was the desire [of Congress] to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cause thereof." *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984). A related justification is to effectuate congressional policy to "stabiliz[e] labor relations." *Street*, 367 U.S. at 760. The same justifications apply in the context of public sector unions. *Abood*, 431 U.S. at 232.

In subsequent cases, this Court has grappled with the question of what expenditures properly are deemed "germane" to the union's duty to bargain collectively. *Ellis*, 466 U.S. at 455. This Court recognized that political expenditures cannot be wrung from objecting nonmembers. Using assessments

> to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make unionshop agreements was justified.

Street, 367 U.S. at 768.

Resolving the tension between other expenses by the union and the dissenters' First Amendment rights has proved more complex. In *Ellis*, this Court

examined whether certain expenses incurred by the union could be passed on to objecting nonmembers under the Railway Labor Act ("RLA"). This Court provided a more specific definition of germane expenses:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, 466 U.S. at 448.

Applying this test to various expenses, the Court first concluded that expenses relating to "conventions" were chargeable to objecting nonmembers. *Id.* The conventions at issue were "national convention[s] at which the members elect[ed] officers, establish[ed] bargaining goals and priorities, and formulate[d] overall union policy." *Id.* The conventions were germane to collective bargaining in the local unit because they "guide[d] the union's approach to

collective bargaining" and strengthened the union's "effectiveness in negotiating labor agreements." *Id.* at 449. The relationship between the conventions and the "union's discharge of its duties as bargaining agent" was sufficiently close that dissenting nonmembers could be charged for such expenses. *Id.*

This Court next examined the chargeability of expenses for social activities. The union had "purchas[ed] refreshments for union business meetings and occasional social activities." *Id.* at 449. The Court concluded that "[l]ike conventions, social activities [were] a standard feature of union operations." *Id.* at 450. Although these functions were "not central to collective bargaining," the Court found that they were germane "because they br[ought] about harmonious working relationships, promote[d] closer ties among employees, and create[d] a more pleasant environment for union meetings." *Id.* at 449-50. The relationship was sufficiently close to the union's duty of collective bargaining to allow the union to charge dissenting employees. *Id.* at 449.

The union also published a monthly magazine for union employees. *Id.* at 450. The union charged dissenting employees for a portion of the costs relating to "collective bargaining, contract administration, and employees' rights." *Id.* The Court found that the union properly could charge for such expenditures, reasoning that the articles constituted "the union's primary means of communicating information" on these relevant subjects. *Id.* However, expenditures that did not relate to articles about collective

bargaining, contract administration, or employees' rights were not chargeable. *Id.*

Turning to organizing expenses, this Court acknowledged that a stronger union throughout the nation would redound to more success for the local union. *Id.* at 451. Nevertheless, this Court found this connection too attenuated to collective bargaining in the nonmember's unit to allow the union to charge such expenses. *Id.* It reasoned that any benefit to the local collective bargaining process was achieved only through "the expansion of overall union power" and that such expansion was not the goal of the RLA. *Id.* at 451-52. Additionally, although the local employees may be free riders in the broad sense by benefitting indirectly from organizing activity, that was not the kind of free riding that the RLA was designed to prevent. *Id.* at 452-53. With respect to litigation, this Court set forth a simple test:

> [t]he expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to [objecting nonmembers] as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative.

Id. at 453. However, "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Id.* As examples,

> objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

Id.

Following its examination of whether the expenses associated with conventions, social activities, and publications were permitted by the RLA, the Court turned to the question of whether these activities infringed on the nonmembers' First Amendment rights. This Court held that these expenses did not infringe their First Amendment rights. With respect to social activities,

> the communicative content [of being forced to contribute to these activities] is not inherent in the act [of contributing], but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his first amendment rights already resulting from the compelled contribution to the union.

Id. at 456. Charges for union conventions and publications distributed to union members were consistent with the First Amendment for the same reason. *Id.* Although conventions and publications certainly "have direct communicative content and involve the expression of ideas," this entailed "little additional infringement of First Amendment rights beyond that already accepted" because the "communicative content" and the "expression of ideas" were not in any way directed outside the union. *Id.*

C. The Fractured Opinion in *Lehnert* Sows Confusion.

This Court revisited these issues in *Lehnert*. *Lehnert* again posed the question of what expenses a union could impose on objecting nonmembers, in this instance faculty members of a public college. *Lehnert*, 500 U.S. at 512. Justice Blackmun, joined by Chief Justice Rehnquist, and Justices White and Stevens, announced the judgment of the Court and delivered the Opinion of the Court with respect to certain portions. *Id.* at 507. Justice Marshall joined the Opinion of the Court, but dissented from certain aspects of Justice Blackmun's opinion. *Id.* at 533-50 (Marshall, J., concurring and dissenting). Justice Scalia, joined by Justices O'Connor, Kennedy, and Souter, agreed with some of the conclusions reached by the majority with respect to particular expenses, but disagreed with the new standard articulated by the majority and suggested a different test. *Id.* at

550-62 (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring).

Lehnert purported to distill the following test from the Court's cases to determine whether a particular charge is permissible: the activity must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519. The Court then applied that test to various categories of union expenditures on a "case-by-case analysis" for each charge. *Id.* at 519, 527-32 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court).

Justice Blackmun, setting forth the reasoning for a four-Justice plurality on this point, first addressed the chargeability of lobbying expenses. *Id.* at 519-22 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The plurality found that where such activities "relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees," *Id.* at 520 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Lobbying fees amounted

to "assessments for political activities outside the scope of the collective-bargaining context" in part because they "would present 'additional interference with the First Amendment interests of objecting employees.'" *Id.* at 521 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). However, Justice Marshall disagreed with this conclusion. In his view, such activities could be charged to objecting nonmembers. *Id.* at 534 (Marshall, J., concurring and dissenting).

Next, the plurality reasoned that expenses associated with the costs of a program to obtain funds in support of public education in Michigan—which, presumably, would increase the funds available to Ferris College—could not be justified because "[n]one of these activities was shown to be oriented toward the ratification or implementation of petitioner's collective-bargaining agreement." *Id.* at 527 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Justice Marshall did not join this portion of the opinion, concluding that this expense was germane and, therefore, chargeable to nonmembers. *Id.* at 543 (Marshall, J., concurring and dissenting).

Regarding extra-unit litigation expenditures, the plurality concluded that the union could not force objecting nonmembers to pay for "expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities." *Id.* at 528

(Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The plurality found

> extra-unit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation. Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extra-unit litigation, we hold that the Amendment proscribes such assessments in the public sector.

Id. (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court) (citations omitted). Justice Marshall, however, noted in his opinion that this portion of the opinion was dicta, because "no such costs are at issue in this case." *Id.* at 544 (Marshall, J., concurring in part and dissenting in part).

The Court approved of "strike benefits" in the context of the negotiations at issue. The union at the time was "engaged in negotiating a new collective-bargaining agreement." *Id.* at 530 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court).

Because the negotiations were stalled, the union prepared "to go out on strike" as a means of promoting progress in the negotiations. *Id.* (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). The lower court had upheld these expenses as "fall[ing] within the range of reasonable bargaining tools available to a public sector union during contract negotiations." *Id.* (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). Thus, the context of this particular ruling was that the union was engaged in contract negotiations involving the unit to which the dissenting employee plaintiffs belonged.

Finally, the Court rejected as germane "[p]ublic relations expenditures designed to enhance the reputation of the teaching profession." *Id.* at 528 (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). After noting that such expenditures entailed "speech of a political nature in a public forum," the plurality also reasoned that

> public speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

Id. at 528-29. (Blackmun, J., joined by Rehnquist, C.J., White, & Stevens, JJ., announcing the judgment of the Court). In contrast, Justice Marshall concluded that this program was chargeable to dissenting nonmembers. *Id.* at 539-42 (Marshall, J., concurring and dissenting).

From the outset in *Lehnert*, four members of the Court expressed their concern about the three-part test articulated by the fractured majority opinion. Justice Scalia, joined by Justices O'Connor, Souter, and Kennedy, noted that the Court's three-part test "both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop." *Lehnert*, 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Justice Scalia wrote that the three-part test was "unhelpful" and "neither required nor even suggested by our earlier cases." *Id.* at 551 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Similarly, Justice Kennedy, in a separate opinion, criticized the standard articulated in the majority opinion as excessively malleable and for drawing "lines with no principled basis." *Id.* at 563 (Kennedy, J., concurring and dissenting).

II. THE THREE-PART TEST IS CONFUSING AND SHOULD BE REPLACED WITH THE "STATUTORY DUTIES" TEST ARTICULATED BY THE CONCURRING AND DISSENTING OPINION IN *LEHNERT*.

A. On Its Own Terms, The *Lehnert* Test Is Cumbersome and Unpredictable.

That the new three-part test is confusing can be readily discerned from the disagreements among the justices. As is apparent from the plain terms of the *Lehnert* test, each of the three parts of the test is open ended. The first component of the test is a requirement that the labor union activity be "'germane' to the collective bargaining activity." *Lehnert*, 500 U.S. at 519. However, the fractured opinion provides little guidance concerning where this line should be drawn. It states that no direct relationship is required between the expenditure and the union's duty to bargain collectively. *Id.* at 522. This in turn begs the question of how indirect the connection must be between the activity and the benefit to the nonmember for the activity to be considered "germane."

Second, the expense must "be justified by the government's vital policy interest in labor peace and avoiding 'free riders.'" *Id.* at 519. In applying this part of the test, the Court first must determine whether the vital policy interest in labor peace is at stake. Precisely what this means is not clear. In addition, it must find that a "free rider" problem exists that needs to be avoided. Not just any kind of

free riding will do, however. It must be the kind "of free rider Congress had in mind." *Ellis*, 466 U.S. at 452.

Finally, the particular activity cannot "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Courts must determine whether a particular activity represents an "additional burden" heaped upon the existing burden. Then, they must determine whether this additional burden is "significant" enough to transgress the invisible line that renders the activity non-chargeable.

As Justice Scalia noted, "each one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?), it seems calculated to perpetuate give-it-a-try litigation of monetary claims that are individually insignificant but cumulatively worth suing about. . . ." *Id.* at 551 (Scalia, J., concurring in part and dissenting in part).

B. *Lehnert* Has Led to Confusion in the Lower Courts.

Predictably, the three-part test is a source of confusion to the lower courts. The conflict in decisions provides ample evidence of this phenomenon. Some Circuits have concluded that extra-unit litigation

expenses are acceptable under a "pooling" arrangement.[5] Other courts have concluded that such expenses are categorically excluded.[6]

The problems associated with the open-ended *Lehnert* test are not confined to extra-unit litigation expenditures. For example, the Fourth Circuit was sharply divided concerning how to apply the *Lehnert* framework to a strike reserve fund and to strike preparation expenditures. *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1301, 1304-05 (4th Cir. 1993) (*en banc*).[7] As Judge Silberman noted, "it is impossible to detect in the Supreme Court cases—particularly *Lehnert*—a principled basis for distinguishing expenditures that are 'germane' from those that are not." *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring in remand for fact-finding).

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[5] *Locke v. Karass*, 498 F.3d 49, 63-65 (1st Cir. 2007); *Otto v. Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 138-39 (3rd Cir. 2003); *Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995).

[6] *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App. 1992).

[7] Five judges—Butzner, Ervin, Hall, Phillips, and Murnaghan—concluded that such expenses were chargeable. Two—Wilkinson and Wilkins—concurred. Five judges—Russell, Widener, Niemeyer, Hamilton, and Luttig—strongly disagreed.

C. *Lehnert* Has Been Criticized in Academic Publications.

Just as the Courts have struggled with the amorphous *Lehnert* test, it also has been pilloried in academic publications.[8] While these criticisms

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[8] Daniel A. Farber, *Essay, Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 155 and n.48 (1994) (listing *Lehnert* as an example of a difficult-to-apply multi-prong test that fails to provide much illumination for the lower courts); Gregory Klass, *The Very Idea of First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1108 (2005) (noting that "[i]n practice . . . the *Lehnert* decision is difficult to apply."); Joseph A. Ciucci, Note, *Defining the Permissible Uses of Objecting Members' Agency Dues: Is the Solution Any Clearer After* Lehnert v. Ferris Faculty Ass'n?, 70 U. DET. MERCY L. REV. 89, 108 (1992) ("the Court [in *Lehnert*] has perpetuated uncertainty and confusion, and will in the future be required to reassess these problems"); W. Kearns Davis, Jr., Crawford v. Air Line Pilots Ass'n: *The Fourth Circuit Determines What Expenses a Union May Charge to Nonunion Workers*, 72 N.C. L. REV. 1732, 1747 (1994) (criticizing the *Lehnert* test and calling for its modification); Mia Guizzetti Hayes, Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After* Johanns v. Livestock Marketing Ass'n, 55 CATH. U. L. REV. 795, 816 (2006) (criticizing *Lehnert* for failing to "offer[ ] [any] clarification of the slippery germaneness standard," and for failing to "address precisely which free speech interests a compelled subsidy burdens."); Monte Arthur Mills, Note, *The Student, The First Amendment and the Mandatory Fee*, 85 IOWA L. REV. 387, 424 (1999) (suggesting an alternative test to replace *Lehnert*, to avoid "the difficulties of unstructured judicial balancing and the substantial judgment calls inherent in the *Lehnert* analysis."); Calvin Siemer, Comment, Lehnert v. Ferris Faculty Ass'n: *Accounting to Financial Core Members: Much A-Dues About Nothing?*, 60 FORDHAM L. REV. 1057, 1059, 1073, 1076 (1992) (criticizing the three-part test as a "debacle" having "little logical consistency" and as a "confused holding.").

certainly are not dispositive, they do underscore the problems of the *Lehnert* test.

D. The Court Should Adopt A More Administrable Standard.

Virginia urges the Court to clarify its jurisprudence and to adopt the test proposed by Justice Scalia. *Lehnert*, 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, Souter, JJ., concurring and dissenting). Although this Court respects precedent, "when governing decisions are unworkable or are badly reasoned," "this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).[9] The vague and open-ended framework articulated in the fractured *Lehnert* decision will continue to produce conflicting results and should be replaced.

The principal justification for *stare decisis* is to promote stability in the law. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Yet, when a test generates unpredictability and instability—and will continue to do so—the justification for upholding the existing standard evaporates.

Justice Scalia, joined by Justices O'Connor, Kennedy, and Souter, proposed the following test: "contributions can be compelled only for the costs of

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[9] *See also Smith v. Allwright*, 321 U.S. 649, 665 (1944).

performing the union's statutory duties as exclusive bargaining agent." *Lehnert*, 500 U.S. at 550 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Furthermore, the test suggested by Justice Scalia would require "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 562 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). This test is more workable. It should be adopted as the governing test.

In *Lehnert*, Justice Scalia applied the "statutory duties" test to various expenditures. Although his opinion did not directly address extra-unit litigation, his analysis of the chargeability of various expenses is instructive.[10]

He noted that under Michigan law, the statutory duty of the union is to serve as "the exclusive representative of all the public employees in [its] unit for purposes of collective bargaining." *Id.* at 558 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Justice Scalia's

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[10] Justice Kennedy, who otherwise agreed with Justice Scalia's articulation of the standard, wrote a separate opinion addressing the issue. Justice Kennedy indicated that he would approve of an arrangement whereby a local union purchases the legal equivalent of an insurance policy with the national union. *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in part and dissenting in part). However, any litigation, to be chargeable to nonmembers, must be "undertaken in the course of the union's duties as exclusive bargaining representative." *Id.*

opinion rejected the chargeability of public relations activities, lobbying expenses and "parts of the union's magazine that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . and other miscellaneous matters." *Id.* at 559 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). In this view, these matters "are no part of this collective bargaining process." *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Justice Scalia also rejected the chargeability of sending union delegates to the convention of a separate organization with which the union bargaining agent has affiliated. *Id.* at 560 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). On the other hand, expenses associated with conventions such as the one in *Ellis*, where the delegates attend the convention of the union bargaining agent itself would be chargeable. *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). The opinion noted that "attendance at certain meetings of [affiliated] organizations, where matters specifically relevant to the union's bargaining responsibilities are discussed, are properly chargeable, but attendance at all conventions seems to me clearly not." *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Justice Scalia's opinion would permit a pro rata assessment of the national union's costs of providing

"collective bargaining services (such as negotiating advice, economic analysis, and informational assistance) to its affiliates nationwide, and in maintaining the support staff necessary for that purpose." *Id.* at 561 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). In this view, "[i]t would also be appropriate to charge to nonunion members an annual fee charged by [the national union to the affiliate] in exchange for contractually promised availability of such services from NEA on demand." *Id.* at 561 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting).

Finally, Justice Scalia rejected the chargeability of strike preparations because "[i]n conducting a strike, a union does not act in its capacity as the government-appointed bargaining agent for all employees." *Id.* at 562 (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). Of course, "visible preparations for a strike strengthen the union's position in negotiations"—as does "the strike itself, and many other union activities, including lobbying." *Id.* (Scalia, J., joined by O'Connor, Kennedy, & Souter, JJ., concurring and dissenting). That, however, does not render the activity chargeable to objecting nonmembers, because "[t]he test of chargeability . . . is not whether the activities at issue help or hinder achievement of the union's bargaining objectives, but whether they are undertaken as part of the union's representational

duty." *Id.* at 562 (Scalia, J., joined by O'Connor, & Souter, JJ., concurring and dissenting).[11] For the sake of lower courts and litigants, the Court should jettison the three-part test articulated in *Lehnert*, adopt the statutory duties test, and remand the case for resolution of the narrow issue under the new test.

CONCLUSION

For the reasons stated above, the Court should **Vacate** and **Remand** the case for reconsideration under the "statutory duties" test.

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[11] Justice Kennedy did not join this portion of Justice Scalia's opinion. *See id.* at 563 (Kennedy, J., concurring and dissenting).

AMICUS CURIAE BRIEF

MOTION FILED
MAY 12 2008

No. 07-610

In the

Supreme Court of the United States

DANIEL B. LOCKE, et al.,
Petitioners,
v.
EDWARD A. KARASS,
State Controller, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, MACKINAC CENTER FOR PUBLIC POLICY, NORTHWESTERN LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.3(b), Pacific Legal Foundation, the National Federation of Independent Business Small Business Legal Center, Mackinac Center for Public Policy, Northwestern Legal Foundation, Southeastern Legal Foundation, and Atlantic Legal Foundation respectfully request leave of the Court to file this brief amicus curiae in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for Maine State Employees Association, SEIU Local 1989, and Service Employees International Union did not respond to Amici's request for consent, and counsel for Respondents Edward A. Karass, Rebecca M. Wyke, and Kenneth A. Walo declined consent, necessitating the filing of this motion.

DATED: May, 2008.

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QUESTION PRESENTED

Did the First Circuit err in determining that the costs of litigation brought on behalf of, or by, a union entity other than the local bargaining representative, and which litigation is funded through a "pooling agreement," may be charged to nonmember employees as part of an "agency shop fee" as long as the litigation meets the *Lehnert v. Ferris Faculty Ass'n* chargeability test, to wit, that such litigation (1) is germane to collective bargaining; (2) is justified by the government's vital policy interest in labor peace and avoiding free riders, and (3) does not significantly add to the burdening of free speech that is inherent in the allowance of an agency shop arrangement?

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TABLE OF AUTHORITIES—Continued

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Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied sub nom. N.J. Pub. Interest Research Group, Inc. v. Galda*, 475 U.S. 1065 (1986) 5

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Pierce v. Underwood, 487 U.S. 552 (1988) 3

Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053
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Rule of Court

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Kionka, Edward J., *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. Ill. U. L. Rev. 469 (2006) 14

Milano, Anthony F., *Evidence-Based Risk Assessment*, 33 J. Ins. Med. 239 (2001) 14

Perkins, F. Daniel, *Can "Sound Actuarial Principles" Be Found in Life Insurance Underwriting?*, 38 Tort Trial & Ins. Prac. L.J. 125 (2002) 14

INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF litigates in defense of the right of workers to refrain from making involuntary payments to support political or expressive purposes with which they disagree.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of agency shop fees will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys represented the petitioners in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

activities). PLF believes the lower court's opinion incorrectly analyzed the holdings of this Court, resulting in objecting nonmembers being compelled to finance, by subsidizing litigation that does not impact the objecting nonmembers' own bargaining unit, the political and ideological activities of a private labor organization with which they disagree. This compelled financing abridges their First Amendment rights of speech and association.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) (formerly known as the NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. NFIB represents over 350,000 members nationally, including over 3,600 members in the State of Maine. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Center frequently files briefs amicus curiae in cases that will impact small businesses nationwide.

In pursuit of its goal to support small business in America, NFIB and the NFIB Legal Center have participated as amicus curiae in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v.*

Metro. Educ. Enters., Inc., 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

The issue of whether national unions can charge nonunion workers legal fees for litigation that does not involve the local chapter is of great importance to the constituency NFIB represents. NFIB members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States. NFIB works to defend limitations that protect nonunion employees from unwittingly or unwillingly financially supporting political causes with which they disagree. Nonunion workers who are required to subsidize unrelated union lawsuits face undue financial hardships and violations of their First Amendment freedoms.

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988. The Mackinac Center for Public Policy believes that compulsory unionism increases the costs of industry, government, and education. This cost increase necessarily results in less money available for the substantive tasks that businesses, governments, and schools exist to accomplish. In government, it discourages the treatment of civil servants as professionals and discourages qualified individuals from becoming government employees. Compulsory unionism also increases the politicization of public employment through the adversarial nature of union bargaining. Fees and costs related to this concept

should be limited to those that directly relate to a union's statutory duties.

Northwestern Legal Foundation (NLF) was established in 1988 as a 501(c)(3) public interest legal foundation. NLF operates in both Washington State and North Dakota. Its focus is on private property rights, individual liberties, free speech, and limiting the excesses of governmental entities. NLF is particularly interested in the relationship between compulsory agency fees and the services that are being funded with such fees. NLF believes this case is particularly important as its outcome will directly impact the scope of unions' ability to exact compelled fees from employees who choose not to join the union.

Southeastern Legal Foundation (SLF) is a constitutional public interest law firm based in Atlanta, Georgia. SLF was founded in 1976 for the purpose of engaging in litigation, education, and public policy initiatives in support of free enterprise, individual rights, and the freedoms guaranteed by the United States Constitution. SLF has participated as amicus curiae in cases throughout the United States involving constitutional issues, including labor union matters.

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm incorporated in Pennsylvania in 1977. Its mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice, and sound science in judicial and regulatory decisionmaking. ALF's goal is to advance the cause of economic and individual freedom by making government—federal, state, and local—more accountable and less intrusive. ALF seeks to advance

these goals through litigation, public advocacy, and education. ALF provides pro bono legal representation to individuals, corporations, trade associations, and similar groups.

ALF's supporters include individuals, business enterprises, law firms, and philanthropic foundations. ALF's board of directors and advisory council consist of legal scholars, corporate legal officers, business executives, prominent scientists, and attorneys. ALF has appeared in this Court and in numerous federal and state appellate courts as counsel to a real party in interest or as an amicus or as counsel to amici. Among the cases involving compelled speech and use of mandatory dues or fees are *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (amicus), and *Galda v. Rutgers*, 772 F.2d 1060, 1064 (3d Cir. 1985), *cert. denied sub nom. N.J. Pub. Interest Research Group, Inc. v. Galda*, 475 U.S. 1065 (1986) (representing plaintiff).

For the foregoing reasons, the motion of PLF, NFIB Legal Center, Mackinac Center for Public Policy, NLF, SLF, and ALF to file a brief amicus curiae should be granted.

SUMMARY OF ARGUMENT

This Court held in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that the threshold requirement for determining whether the costs of certain union activities can be charged to dissenting nonmembers as part of their "agency fee" is whether the activity is "germane to collective-bargaining." *Id.* at 519 (plurality opinion of Blackmun, J., Rehnquist, C.J., White, J., and Stevens, J.). The *Lehnert* germaneness test has not provided consistent results. This Court

should construe the *Lehnert* plurality's germaneness test consistent with Part II of the concurring and dissenting opinion authored by Justice Scalia (*Lehnert*, 500 U.S. at 552-58) (joined by O'Connor, J., Souter, J., and Kennedy, J.), so as to allow unions to charge nonmembers only for those activities that are germane to the bargaining unit's statutory activities as exclusive bargaining representative. Such a test protects the First Amendment rights of dissenting nonmembers while allowing unions to provide the core services that the government believes will result in labor peace and stability.

Like the case at bar, *Lehnert* dealt with public employees who were compelled to contribute to activities of their local union's parent organization under a "pooling arrangement." *Lehnert* established a three-part test whereby activities must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop" in order to be chargeable to dissenting nonmembers. *Id.* at 519 (plurality).

Although this Court examined several specific categories of union expenditures, the chargeability of extraunit litigation, or litigation undertaken by a union entity other than the dissenting nonmember's bargaining unit pursuant to a pooling agreement, was not at issue in *Lehnert*. These extraunit litigation costs are not "germane to collective bargaining" under the first part of the *Lehnert* test; moreover, the very phrase "germane to collective bargaining" should be limited to mean "incurred for the conduct of activities

in which the union owes a duty of fair representation to the nonmembers being charged." *Id.* at 558 (Scalia, J., concurring and dissenting).

The agency shop arrangement constitutes a significant impingement on the First Amendment rights of dissenting employees. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447 (1984). This impingement is justified only by the government's vital interest in the peaceful labor relations that flows from allowing employers to designate an exclusive bargaining representative. *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956); *Ellis*, 466 U.S. at 447; *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 (1977); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 302-03 (1986). By divorcing the concept of germaneness from the bargaining unit's direct collective bargaining activity, the First Circuit leaves the domain of activities that a union might subsidize with nonmembers' compelled fees so broad and elastic as to extinguish dissenting nonmembers' protection against all but the most egregious First Amendment violations.

This is particularly true where the expenditure is for *inherently expressive* activity such as litigation. *See NAACP v. Button*, 371 U.S. 415, 431 (1963) (recognizing the effectiveness of litigation as a form of political association). When an exclusive bargaining unit spends the money that nonmembers are compelled to pay under the agency shop arrangement on activities that are "expressive" activities under the First Amendment, this Court should apply a more stringent analysis than the one that applies generally to activities paid for under a "pooling" agreement as

established by *Lehnert*. By limiting unions' right to spend nonmembers' compelled fees to those activities that are germane to the bargaining unit's own statutory duties as exclusive collective bargaining representative nonunion employees' First Amendment rights will be adequately protected.

ARGUMENT

I

THE FIRST AMENDMENT PROHIBITS USING DISSENTING NONMEMBERS' SERVICE FEES ON ACTIVITIES THAT DO NOT SUPPORT THE GOVERNMENT'S COMPELLING INTEREST IN PEACEFUL LABOR RELATIONS

By limiting chargeable activities to those that arise from the bargaining unit's statutory duties as exclusive bargaining representative, the government's interest in the labor peace and stability that results from collective bargaining is advanced without unnecessarily impinging upon the First Amendment rights of dissenting nonmembers.

Ever since this Court's first examination of the constitutional challenges to state compulsion of union dues, the analytical focus has been on the union's role as an exclusive bargaining agent. In 1951, Section 2, the Eleventh of the Railway Labor Act, 45 U.S.C.A. § 152, was amended to permit railway carriers to establish union or agency shops. In *Hanson*, 351 U.S. 225, this Court upheld the union shop agreement that was expressly authorized by the Railway Labor Act on grounds that "the requirement for financial support of the collective-bargaining agency by all who receive the

benefits of its work is within the power of Congress . . . and does not violate . . . the First . . . Amendment[]." *Id.* at 238. This was extended to agency shops in *Abood*, 431 U.S. 209, so long as the agency shop fees extracted from nonunion members were "used to finance expenditures by the Union for the purposes of *collective bargaining, contract administration,* and *grievance adjustment.*" *Id.* at 225-26 (emphasis added). *See also Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961) (fees or dues could be required of nonmembers only to the extent that they were related to the union's role as negotiator and administrator of the collective bargaining agreement, not for political or ideological purposes).

The narrowness of the germaneness test was emphasized in *Ellis*, 466 U.S. 435, which underscored the premise of these cases that when a state adopts an "agency shop" arrangement, the First Amendment rights of nonmember employees are impinged upon by the "agency fee" doctrine because nonmember employees are being required to "support financially an organization with whose principles and demands [they] may disagree." *Id.* at 455. "[B]y allowing the union shop at all, we have already countenanced a *significant impingement* on First Amendment rights." *Id.* (emphasis added). When determining whether a designated collective bargaining representative may charge dissenting employees for the union's litigation costs, only those litigation expenses that are incident to negotiating and administering the collective bargaining agreement and settling disputes arising in the bargaining unit are chargeable to dissenting employees, and that "[t]he expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Id.* at 453.

This Court stated unambiguously in *Ellis* that, "when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are *necessarily or reasonably incurred* for the purpose of *performing the duties of an exclusive representative* of the employees in *dealing with the employer on labor-management issues*." 466 U.S. at 448 (emphasis added). *See Abood*, 431 U.S. at 222-23; *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 754 (1988).

In *Lehnert*, 500 U.S. 507, a four-member plurality of this Court concluded that the expenses of litigation conducted by a union's national affiliate, which litigation does not concern the dissenting employee's bargaining unit, were "more akin to lobbying in both kind and effect," and that "[j]ust as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector." *Id.* at 528 (Blackmun, J., joined by Rehnquist, C.J., White, J., and Stevens, J.). Four other Justices would have found extraunit litigation expenses nonchargeable under the test advocated by Amici herein, as set forth in the concurring and dissenting opinion authored by Justice Scalia, to wit, agency shop "contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." *Id.* at 550 (Scalia, J., concurring and dissenting, joined by O'Connor, J., Souter, J., and Kennedy, J.).

All of these cases stand for the proposition that an exclusive representative may compel nonmembers to pay a service fee only when the fee is spent by the local

bargaining unit in its role as exclusive collective bargaining agent. The justification for an agency shop fee, e.g., requiring workers "to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent," is accomplished *only* where the expenditure is for the actual costs of collective bargaining to which nonmembers are obligated to contribute. *Street*, 367 U.S. at 787 (Black, J., dissenting). In order to be chargeable to dissenting nonmembers, particular union expenditures must remain tethered to the fundamental justification for the agency shop fee. As stated in *Abood*,

> [t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones . . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free-riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

431 U.S. at 221-22.

Thus, "the state interest that can justify mandatory dues arises solely from the union's statutory duties." *Lehnert*, 500 U.S. at 553 (Scalia, J., concurring in part and dissenting in part).

Justice Scalia then stated:

> Once it is understood that the source of the state's power, despite the First Amendment,

> to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances," *Abood*, 431 U.S. at 221; the cost of performing the union's "statutory functions," *Ellis*, 466 U.S. at 447; [and] the expenses "necessary to 'performing the duties of an exclusive representative,' " *Beck, supra*, 487 U.S. at 762.

Lehnert, 500 U.S. at 556-57.

Because the intrusion on dissenting nonmembers' First Amendment rights can be justified only by a compelling government interest, unions are not permitted to use agency fees on activities that are not germane to the fundamental justification for the agency fee. In this case, however, the First Circuit permitted far greater intrusion by adopting a test for germaneness that broadly allows dissenting nonmembers' compelled fees to be used on litigation that is undertaken by or on behalf of an entity other than the dissenting nonmembers' own bargaining unit.

II

EXTRAUNIT LITIGATION FUNDED BY A POOLING AGREEMENT IS NOT GERMANE TO THE LOCAL BARGAINING UNIT'S STATUTORY DUTIES AS EXCLUSIVE BARGAINING REPRESENTATIVE

A. A Pooling Arrangement Is Not Akin to Insurance

The First Circuit's decision relied heavily upon the distinction between union expenditures that are paid directly by the bargaining unit and those that are paid into a "pool" of resources that may or may not actually be spent upon the local bargaining unit, but that are purportedly sufficient to obligate the national affiliate to make its resources available to the local whenever they are needed. *Locke v. Karass*, 498 F.3d 49, 64 (1st Cir. 2007). The First Circuit did not try to justify the expenditure on grounds that the extraunit litigation itself bestowed a benefit upon dissenting nonmembers. The charge to nonmembers was deemed "connected" to the local bargaining unit by virtue of the "tangible benefit" that flowed from having the national affiliate's resources available "on call." *Id.*

This "tangible benefit" of the pooling arrangement was likened unto "insurance, whereby the local unit contributes certain amounts to a larger fund in order to ensure that the larger fund will provide resources (in the form of services or money) in return, when the local unit needs them." *Id.* The First Circuit also stated that" '[e]ven if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an

expense-pooling agreement: the availability of on-call resources greater than those it could muster individually.' " *Id.* (quoting *Otto v. Pa. State Educ. Ass'n-NEA*, 330 F.3d 125, 136 (3d Cir. 2003)).

In the context of a First Amendment challenge to the use of compelled fees, the insurance analogy breaks down. The primary difference between the pooling arrangement and insurance has to do with the process of establishing a premium for the insurance coverage purchased. Typically, an insurer will consider several factors in determining the premium that will be charged for the chosen coverage. While the specific factors used will vary depending upon the type of insurance at issue, and different carriers will weigh factors differently, insurers must still weigh the risk of loss for which insurance is purchased against the cost of providing coverage should the loss occur. *See* F. Daniel Perkins, *Can "Sound Actuarial Principles" Be Found in Life Insurance Underwriting?*, 38 Tort Trial & Ins. Prac. L.J. 125 (2002) (describing, generally, the risk classification process for life insurance); Anthony F. Milano, *Evidence-Based Risk Assessment*, 33 J. Ins. Med. 239 (2001).

Although the precise factors that go into this calculation may differ, the price of insurance coverage is related to the likelihood that the policyholder will make a claim upon the insurer. Indeed, one of the factors an insurer will consider in setting a premium is whether the insured has implemented "risk management" protocols designed to reduce the risk that a claim will be made. *See* Edward J. Kionka, *Things to Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. Ill. U. L. Rev. 469, 505 (2006) (stating that insurers "may also offer

discounts on premiums for insured's participation in risk management activities").

Thus, in the insurance context, there is a clear connection between the amount the insurer is charging its policyholders, the benefit the policyholders expect to receive from the insurer, and the cost to the insurer for providing that benefit. The insurer's ability to stay in business is determined by its ability to accurately assess the likelihood and potential size of a claim being filed by a covered member of a particular group in order to set their premium at a price that will allow it to cover claimed losses and attract premium-payers. In the pooling arrangement, there is no such connection. The charge for extraunit litigation is made solely with respect to the litigation costs incurred by bargaining units other than the one that is compelling its nonmember to pay an agency fee. The local bargaining unit has no say in selecting, investigating, pursuing, or declining participation in these cases.

Without any real connection between the local unit and extraunit litigation, it is difficult to see how the existence of a "pooling agreement" transforms extraunit litigation into an activity that is germane to the collective bargaining activities of the local bargaining unit.

B. Litigation Is an Inherently Expressive Activity That Is Entitled to First Amendment Protection Independent of the Content of the Litigation

The First Circuit subjected litigation expenses paid for through a pooling agreement to the same general chargeability test that the *Lehnert* Court applied to all other activities paid for under such a cost

sharing mechanism. *Locke*, 498 F.3d at 64. In so doing, the First Circuit declined to follow that part of the opinion authored by Justice Blackmun in *Lehnert* which determined that because of the "important political and expressive nature of litigation," the rationale for requiring nonmembers to share in the general collective-bargaining costs incurred by the state or national parent union does not extend to the expenses of litigation that does not concern the nonmembers' bargaining unit. *Lehnert*, 500 U.S. at 528. The "statutory duties" test set forth in Justice Scalia's concurring and dissenting opinion recognizes the higher level of protection afforded by the First Amendment by explicitly requiring that any expenditure of compelled dues confer a direct and tangible benefit on the dissenters' bargaining unit. *Id.* at 562.

In *Ellis*, certain expenses were held to be constitutionally chargeable to nonmembers on the grounds that charging nonmembers for them does not "increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Ellis*, 466 U.S. at 456. This Court held that the activity at issue in *Ellis* (union social activities and their related costs) was not, in and of itself, an "expressive" activity that raised serious First Amendment concerns. *Id.* Charging the costs of such social activities to nonmembers was deemed constitutional because "the communicative content is not inherent in the act, but stems from the union's involvement in it." *Id.* The First Circuit distinguished *Ellis* as pertaining only to direct costs of a national affiliate rather than costs incurred under a pooling agreement. *Locke*, 498 F.3d at 63. In relying on this

distinction, the First Circuit ignored the "communicative content" factor considered in *Ellis*, and reached its conclusion by simply giving greater weight to the form of the charge than to the activity it produces.

Justice Scalia observed this distinction in his concurring/dissenting opinion in *Lehnert*, and would have disallowed charging nonmembers for the costs of the union's newsletter, because "the newsletter is inherently communicative; that the Court thinks what it communicates is 'for the benefit of all,' does not lessen the First Amendment injury to those who do not agree." *Lehnert*, 500 U.S. at 560 (citation omitted).

Justice Blackmun's plurality opinion in *Lehnert* observed that this Court has previously recognized the expressive nature of litigation. In *Button*, 371 U.S. 415, this Court concluded that in certain circumstances, "association for litigation may be the most effective form of political association." *Id.* at 431. In *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971), this Court interpreted *Button* as meaning that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585.

By establishing a bright line—extraunit litigation that is not germane to the bargaining unit's statutory duties is not chargeable to a particular bargaining unit's dissenting nonmembers—this Court would avoid the uncertainty and inconsistency that is sure to continue under a rule that requires an examination of the nature of each case that is litigated under a pooling arrangement. The range of causes and subjects of litigation that is undertaken by both local and national

union organizations is so broad, and so often includes subjects that are patently political or ideological, that consistent application of such an *ad hoc* rule would be impossible.

Indeed, searching back a mere three years, SEIU[2] and/or its local affiliates have been involved, either as a party or as amicus, in the following cases, which constitute but a sampling of the universe of litigation activities conducted by the SEIU national and/or local organizations:

Golden Gate Rest. Ass'n v. City & County of S.F., 512 F.3d 1112 (9th Cir. 2008); as intervening appellants, SEIU challenges certain provisions of the newly enacted San Francisco Health Care Security Ordinance.

Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053 (9th Cir. 2007), *cert. granted sub nom. Ysursa v. Pocatello Educ. Ass'n*, No. 07-869, 2008 WL 833273 (U.S. Mar. 31, 2008); as co-plaintiff, SEIU challenges provisions of the Idaho Voluntary Contributions Act, which bans payroll deductions for political activities.

Ne. Ohio Coal. for the Homeless & SEIU, Local 1199 v. Blackwell, 467 F.3d 999 (6th Cir. 2006); SEIU and others brought an action against the Ohio Secretary of State challenging Ohio's absentee ballot

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[2] As one of the Respondents in this case, Service Employees International Union, as the parent union of co-Respondent SEIU Local 1989, is headquartered in Washington, D.C., and has over 300 local union affiliates, representing approximately 1.9 million workers in four job sectors: hospital systems, long term care-givers, property services, and public services. *See* http://www.seiu.org/index.cfm (and related links) (last visited May 6, 2008).

voter identification laws as violating the Due Process and Equal Protection Clauses of the United States Constitution.

Diaz v. Sec'y of the State of Fla., No. 04-15539, 2005 WL 2402748, at *1 (11th Cir. Sept. 29, 2005); as a co-plaintiff, SEIU brought an action that addresses Florida voter registration law.

Futurewise v. Reed, 166 P.3d 708 (Wash. 2007); SEIU local 776NW and others sought to prohibit the Washington Secretary of State from placing an initiative on the ballot that would require two-thirds legislative approval or voter approval for certain tax increases.

In re Abbott Laboratories Norvir Anti-Trust Litigation, No. C 04-1511 CW, 2007 WL 4365506, at *1 (N.D. Cal. Dec. 13, 2007); SEIU and others brought an anti-trust action arising from a 400% increase for an anti-HIV drug manufactured by the defendant.

Bevona v. SEIU, AFL-CIO, No. 05 Civ. 1157(DLC), 2007 WL 1378425 (S.D.N.Y. May 10, 2007); a former Vice President of defendant SEIU resigned and then sued over disputes regarding his pension, benefits, and legal fees.

SEIU v. Comm'r Internal Revenue, 125 T.C. 63 (T.C. 2005); an action by SEIU challenging an IRS determination to proceed with collection by levy of penalty imposed against organizations for failure to file annual return.

Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007); SEIU joined in an amicus brief in an action brought under Title VII of the Civil Rights Act

for alleged discrimination because of race and national origin.

Because litigation so directly employs and impacts First Amendment rights, it deserves to be treated differently than other expenditures that purport to benefit those who are compelled to pay for it. Thus, in determining the test to apply to the chargeability of certain union activities, this Court should recognize the inherently expressive nature of litigation. While nonmembers certainly may derive a tangible benefit from litigation that is brought by or on behalf of the nonmembers' bargaining unit, and can therefore properly be charged for such litigation if it meets the "germane to the bargaining unit's statutory collective bargaining duties" criteria, the benefit of extraunit litigation is too speculative and far removed from the bargaining unit's core statutory duties to justify the added impingement on nonmembers' First Amendment rights.

Determining the scope of rights and responsibilities of individuals and the public under the First Amendment is an exercise that often requires "a delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). This Court recognizes the balance between the dues payers' rights of free speech and association on the one hand, and the government's interest in labor peace through collective bargaining on the other. This Court should now recognize that when one side of the scale contains inherently expressive activity, such as litigation, the scale is tipped toward requiring a heightened degree of "germaneness" to the union's collective bargaining activities than when the scale holds nonexpressive

activities that are objectionable only "from the union's involvement in it." *Lehnert*, 500 U.S. at 559 (citation omitted) (Scalia, J., concurring and dissenting).

Under the *Lehnert* concurrence, which Amici propose the Court adopt as controlling in this case, only the costs of a bargaining unit's statutory duties as collective bargaining representative may be charged to nonmembers—thus, extraunit litigation costs would not be chargeable to nonmembers, while the local bargaining unit would be allowed to charge nonmembers for those of its litigation costs that arise from its collective bargaining duties.

CONCLUSION

The test that the First Circuit used to determine the chargeability of extraunit litigation costs does not adequately protect the First Amendment rights of dissenting nonmembers because it is so broad and malleable. The test also fails to consider the inherently expressive nature of litigation. Thus, this Court should limit the amount of compelled fees that unions are entitled to extract from nonmembers to those that cover the bargaining unit's statutory duties as exclusive bargaining representative, as Justice Scalia advocated in his concurring and dissenting opinion in *Lehnert*.

For these reasons, the decision of the First Circuit should be reversed.

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Respectfully submitted,

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